

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 545

JOSEPH E. SEAGRAM & SONS, INC., ET AL.,  
APPELLANTS,

vs.

DONALD S. HOSTETTER, ETC., ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

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[fol. 1]

**IN THE SUPREME COURT  
OF THE STATE OF NEW YORK  
COUNTY OF ALBANY**

Index No. 6127-64

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JOSEPH E. SEAGRAM & SONS, INC., THE HOUSE OF SEAGRAM, INC., STITZEL-WELLER DISTILLERY, INC., THE PADDINGTON CORPORATION, HIRAM WALKER, INCORPORATED, GOODERHAM & WORTS, LIMITED, JAS. BARCLAY & CO., LIMITED, W. A. TAYLOR & COMPANY, HIRAM WALKER DISTRIBUTORS, INC., THE AMERICAN DISTILLING COMPANY, MCCORMICK DISTILLING COMPANY, THE FLEISCHMANN DISTILLING CORPORATION, MR. BOSTON DISTILLER, INC., THE VIKING DISTILLERY, INC., JAMES B. BEAM DISTILLING COMPANY, JAMES B. BEAM IMPORT CORPORATION, SCHENLEY INDUSTRIES, INC., AFFILIATED DISTILLERS BRANDS CORP., KNICKERBOCKER LIQUORS CORP., BARTON DISTILLING COMPANY, BARTON DISTILLERS IMPORT CORPORATION, JULIUS WILE SONS & COMPANY, INC., BACARDI IMPORTS, INC., AUSTIN NICHOLS & COMPANY, INC., CANADA DRY CORPORATION, HEUBLEIN, INC., MCKESSON & ROBBINS, INC., NATIONAL DISTILLERS AND CHEMICAL CORPORATION, PUBLICKER DISTILLERS PRODUCTS, INC., WAYNE LIQUOR CORP., BROWN-FORMAN DISTILLERS CORPORATION, GLENMORE DISTILLERIES COMPANY, A. SMITH BOWAN DISTILLERY, INC., "21" BRANDS, INC., STAR HILL DISTILLING COMPANY, SCHIEFFELIN & COMPANY, ALPINE WINE & LIQUOR CORP., BEN PERLOW LIQUOR CORP., BISON LIQUOR CO., INC., BLUE CREST WINE AND SPIRIT CORP., BONNY DISTRIBUTING CO., INC., CAPITAL DISTRIBUTORS CORP., CARDINAL DISTRIBUTORS, INC., COLONY LIQUOR DISTRIBUTORS, INC., DISTILLED BRANDS, INC., EBER BROS. WINE & LIQUOR CORP., ELMIRA TOBACCO CO., INC., EMPIRE LIQUOR CORP., GRAVES & RODGERS, INC., M. LICHTMAN & CO., INC., MAJOR LIQUOR DISTRIBUTORS, INC., MONARCH LIQUOR CORP., MULLEN &

GUNN, INC., PEERLESS IMPORTERS CORP., RAMAPO WINE & LIQUOR CORPORATION, ROCHESTER LIQUOR CORPORATION, RODGERS LIQUOR CO., INC., S & K WINE & LIQUOR CORP., STANDARD FOOD PRODUCTS CORP., STANDARD WINE & LIQUOR CO., INC., STAR INDUSTRIES, INC., UNIVERSAL LIQUOR CORP., Plaintiffs,

against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the STATE LIQUOR AUTHORITY, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants.

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SUMMONS—October 29, 1964

To the above named Defendants:

You are hereby Summoned to answer the complaint in this action and to serve a copy of your answer on the Plaintiffs' Attorneys within 20 days after the service of this summons, exclusive of the day of service; and in case [fol. 2] of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York, October 29, 1964.

Lord, Day & Lord, Attorneys for Plaintiffs, Office  
and Post Office Address: 25 Broadway, Borough  
of Manhattan, City of New York 10004.

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

COMPLAINT

Plaintiffs, complaining of defendants by Lord, Day & Lord, their attorneys, allege:

For a Separate and Distinct First Cause of Action:

1. Joseph E. Seagram & Sons Inc. is a foreign corporation organized and existing under the laws of the State of Indiana, duly qualified to do business in the State of New York.

2. The House of Seagram, Inc. is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

[fol. 3] 3. Stitzel-Weller Distillery is a foreign corporation organized and existing under the laws of the State of Kentucky.

4. The Paddington Corporation is a domestic corporation organized and existing under the laws of the State of New York.

5. Hiram Walker Incorporated is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

6. Gooderham & Worts Limited is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

7. Jas. Barclay & Co., Limited is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

8. W. A. Taylor & Company is a domestic corporation organized and existing under the laws of the State of New York.

9. The American Distilling Company is a foreign corporation organized and existing under the laws of the State of Maryland, duly qualified to do business in the State of New York.

10. McCormick Distilling Company is a foreign corporation organized and existing under the laws of the State of Missouri.

11. The Fleischmann Distilling Corporation is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 4] 12. Mr. Boston Distiller Inc. is a foreign corporation organized and existing under the laws of the State of Massachusetts, duly qualified to do business in the State of New York.

13. The Viking Distillery, Inc. is a foreign corporation organized and existing under the laws of the State of Georgia.

14. James B. Beam Distilling Company is a foreign corporation organized and existing under the laws of the State of Illinois.

15. James B. Beam Import Corporation is a domestic corporation organized and existing under the laws of the State of New York.

16. Schenley Industries Inc. is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

17. Affiliated Distillers Brands Corp. is a domestic corporation organized and existing under the laws of the State of New York.

18. Knickerbocker Liquors Corp. is a domestic corporation organized and existing under the laws of the State of New York.

19. Barton Distilling Company is a foreign corporation organized and existing under the laws of the State of Delaware.

20. Barton Distillers Import Corporation is a domestic corporation organized and existing under the laws of the State of New York.

21. Julius Wile Sons & Company, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 5] 22. Bacardi Imports, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

23. Austin Nichols & Company, Inc. is a foreign corporation organized and existing under the laws of the State of Virginia, duly qualified to do business in the State of New York.

24. Canada Dry Corporation is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

25. Heublein Inc. is a foreign corporation organized and existing under the laws of the State of Connecticut, duly qualified to do business in the State of New York.

26. McKesson & Robbins, Inc. is a foreign corporation organized and existing under the laws of the State of Maryland, duly qualified to do business in the State of New York.

27. National Distillers and Chemical Corporation is a foreign corporation organized and existing under the laws of the State of Virginia, duly qualified to do business in the State of New York.



28. Publicker Distillers Products, Inc. is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

29. Brown-Forman Distillers Corporation is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

30. Glenmore Distilleries Company is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

[fol. 6] 31. A. Smith Bowman Distillery Inc. is a foreign corporation organized and existing under the laws of the State of Virginia.

32. "21" Brands Inc. is a domestic corporation organized and existing under the laws of the State of New York.

33. Star Hill Distilling Company is a foreign corporation organized and existing under the laws of the State of Kentucky, duly qualified to do business in the State of New York.

34. Schieffelin & Company is a domestic corporation organized and existing under the laws of the State of New York.

35. Defendants Donald S. Hostetter, John C. Hart, William H. Morgan, Benjamin H. Balcom and Robert E. Doyle are commissioners of the State Liquor Authority duly appointed by the Governor of the State of New York charged with the responsibility of administering the Alcoholic Beverage Control Law including the implementation of said Alcoholic Beverage Control Law by the promulgation of rules and regulations for the purpose of effecting said law.

36. Defendant Louis J. Lefkowitz is the Attorney General of the State of New York, the Chief Legal Officer of

the State of New York, and as such is charged with the enforcement of the provisions of the Alcoholic Beverage Control Law.

37. The above-listed plaintiffs are distillers, importers, or wholesalers designated as agents of distillers of liquor which is sold in New York.

38. In an extraordinary session, the Legislature of the State of New York enacted Chapter 531 of the Laws of 1964 by which it amended the Alcoholic Beverage Control Law in several respects. (A copy of Chapter 531 here-[fol. 7] inafter called "The New Act" is attached hereto as Exhibit "A". Section references herein are to sections of Chapter 531. Subdivision and paragraph references bear identifying labels accorded them as they will appear in Section 101-b of the Alcoholic Beverage Control Law as that law has been amended by Chapter 531, but are described herein as if subdivisions of the sections of Chapter 531 in order to facilitate reference to Exhibit "A").

39. Section 101 b-3 of the Alcoholic Beverage Control Law, as amended by The New Act, requires that for all brands of liquor or wine sold to or purchased by a wholesaler in New York, there must be filed with the State Liquor Authority by:

"(1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose."

schedules of prices to wholesalers for such brands. The Alcoholic Beverage Control Law fails to provide an exact definition of "the owner of such brand". Section 101-b of the Alcoholic Beverage Control Law further requires that for all brands of liquor or wine sold to or purchased by re-

tailers in New York State, a schedule of prices for such brands must be filed with the State Liquor Authority by "each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers". Each schedule must be filed on or before the tenth day of each month (see paragraph 4 of Section 7 of The New Act). The prices and discounts set forth in such schedules become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month.

[fol. 8] 40. The New Act in Section 9 (Exhibit "A", pp. 8-10) significantly expands upon the former requirements of Section 101-b, subdivision 3, pertaining to the filing of price schedules, by adding eight entirely new paragraphs (paragraphs (d) through (k)) to that subdivision.

41. Paragraph (d) of Section 9 of The New Act (Exhibit "A", p. 8) requires that a brand owner or wholesaler designated as agent must file an "affirmation" verified by the brand owner or wholesaler designated as agent, that the price listed on the schedule of prices to wholesalers (at which liquor is sold to New York wholesalers) is no higher than the lowest price at which the same item of liquor was sold by them or by any "related person" to any wholesaler, anywhere in any other state of the United States or in the District of Columbia during the preceding calendar month.

42. Paragraph (f) of Section 9 of The New Act (Exhibit "A", p. 9) incorporates an affirmation requirement similar to that found in paragraph (d), in requiring from a brand owner or a wholesaler designated as agent, an affirmation verified by the brand owner or wholesaler designated as agent that the price at which liquor is sold by a brand owner, wholesaler designated as agent, or a "related person" to retailers in New York State is no higher than the price at which the same item of liquor was sold to retailers in any other state of the United States (other

than "monopoly states", states which themselves or through state agencies own and operate retail liquor stores) or in the District of Columbia during the preceding calendar month. Paragraph (f) does not specify who is to file the affirmation.

43. "Related person" is defined in paragraphs (d) and (f) of Section 9 of The New Act as:

"any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands."

44. Paragraph (e) of Section 9 of The New Act (Exhibit "A", p. 8) imposes an affirmation filing requirement similar to that found in paragraph (d) but applies it to the filing of "any other schedule" of prices to wholesalers. Here the affirmation must be made and verified by the person filing the schedule. Paragraph (e) requires that the person filing "any other schedule" has not sold at a lower price in any other state. It does not contain any provisions relative to sales by "related persons".

45. Paragraph (g) of Section 9 of The New Act (Exhibit "A", p. 9) follows the form of paragraph (e) in requiring that an affirmation must accompany "any other schedule" of prices to retailers. The affirmation must be made and verified by the person filing the schedule.

46. As paragraphs (e) and (g) are interpreted by State Liquor Authority Rule 16, §65.7 as amended effective October 31, 1964, such paragraphs apply only to schedules of prices for sales to wholesalers and retailers where the sales are made by persons who are not "related persons"

as that term is defined by paragraphs (d) and (f) of Section 9 of The New Act.

47. Paragraph (i) of Section 9 of The New Act (Exhibit "A", pp. 9-10) requires that in determining what is the lowest price at which an item of liquor was sold in another state, appropriate reductions must be made to include all discounts, rebates, free goods, allowances and [fol. 10] other inducements of any kind whatsoever offered or given to wholesalers or retailers in such other state. However, in computing the lowest price, reductions need not be made where price differentials make only due allowance for differences in state gallonage taxes or differentials in the actual cost of delivery.

48. The New Act does not include vintners and wholesalers of wine as persons required to file affirmations and verifications in accordance with the provisions of paragraphs (d) through (g) of Section 9 of The New Act.

49. Paragraph 3(c) of Section 7 of The New Act (Exhibit "A", p. 6) exempts from the filing and affirmation requirements described above a brand of liquor which is owned exclusively by one retailer and sold at retail within the state exclusively by such retailer. Such brands are hereinafter referred to as "private labels".

50. Paragraph (j) of Section 9 of The New Act (Exhibit "A", p. 10) makes it a misdemeanor for any person to make a false statement in any affirmation filed pursuant to the Act. Upon conviction a person may be fined up to \$10,000 and imprisoned for up to a period of six months.

51. Paragraph 6 of Section 7 of The New Act grants to the State Liquor Authority the power to cancel, suspend or revoke a license for failure to comply in any manner with any of the provisions of Section 101-b as amended by The New Act. The Authority is also permitted by paragraph (k) of Section 9 of The New Act to refuse to accept, for a period not exceeding three calendar months, any af-

firmation required to be filed by a person who has been convicted of making a false statement in any affirmation.

52. Paragraph (h) of Section 9 of The New Act (Exhibit "A", p. 9) prohibits sales in New York of any brands for which an affirmation has not been filed.

[fol. 11] 53. Section 9 of The New Act violates the Articles of the Constitution of the State of New York, and the Articles of the Constitution of the United States, by depriving plaintiffs of liberty and property without due process of law in that:

(a) Distillers and wholesalers will be severely injured by being compelled to sell in New York State at artificial prices, irrespective of marketing conditions, net profit margins, cost of doing business in New York as compared to other states, and other factors which distinguish New York from other markets;

(b) In attempting compliance with the requirements of Section 9 of The New Act, plaintiffs will be compelled to reorganize completely their sales methods and accounting procedures, and/or institute entirely new communication and price recording machinery;

(c) The affirmation and verification provisions of Section 9 of The New Act, enforced conjunctly with various price posting requirements in other states, may operate to permanently prevent distillers and wholesalers designated as agents from at any time in the future increasing the price of brands sold by them to the New York wholesalers and in any event will unjustifiably accord New York purchasers the benefit of lower prices for two or more months after a price increase has become effective in other states. These unreasonable results will be effected even though, due to increased costs or other factors, there may be a perfectly justifiable reason to increase the price;

(d) Persons who satisfy the definition of "related person" described in paragraphs (d) and (f) of Section 9 of The New Act would be disabled from competing with local

wholesalers in states other than New York and disabled from competing with distillers and importers who sell brands not sold in New York State. Non-related local wholesalers in states other than New York could for any [fol. 12] competitive reason conduct special local discount sales campaigns and grant allowances and inducements without fear that such campaigns might drive down the price at which the same brand is sold to retailers in New York State. Distillers and importers selling brands not sold in New York could, as to those "non-New York brands", compete with complete freedom in a non-New York market. A distiller or importer in that same market who sells competitive brands which are also sold in New York would have to consider the effect upon his New York price before responding to competitive pressures in the non-New York market. The effect of The New Act upon distillers, importers and wholesalers outside New York who nevertheless qualify as "related persons" will be to destroy or severely hamper their competitive position in their own local markets even though they may be completely remote from New York State.

54. Section 9 of The New Act is an arbitrary, capricious and unreasonable exercise of the state's police power for the following reasons:

(a) The term "related person" found in paragraphs (d) and (f) of Section 9 of The New Act (Exhibit "A", pp. 8, 9) is so vague that distillers, importers and wholesalers designated as agents are unable to determine what persons both within and without New York State satisfy this definition and therefore must be taken into account in furnishing the affirmations required by The New Act:

(b) Even if distillers, importers and wholesalers designated as agents could determine who is a "related person" they would have no power to compel such "related person" to furnish them with information as to the prices at which they sell their products in states other than New York;



[fol. 13] (c) Paragraph (i) of Section 9 of The New Act (Exhibit "A", pp. 9, 10) unreasonably limits price differentials to state "gallongage" taxes or fees. It does not include differentials for taxes imposed on a "per case basis". Nor does it permit differentials based upon a state sales or gross receipts tax;

(d) It is impossible for many distillers, importers and wholesalers designated as agents to determine the prices in any given month at which brands sold by them in New York are sold to wholesalers throughout the United States and the District of Columbia;

(e) It is impossible for distillers, importers, wholesalers designated as agents, or "related persons" to determine the prices at which brands sold by them in New York are sold to retailers throughout the United States and the District of Columbia;

(f) It is impossible for distillers, wholesalers designated as agents, or "related persons" to determine what is meant by "rebates, free goods, allowances and inducements of any kind whatsoever" so as to be able to make appropriate reductions in computing the lowest price for such items as required by paragraph (i) of Section 9 of The New Act.

55. Section 9 of The New Act is inconsistent with the declared policy of the Alcoholic Beverage Control Law as expressed in Sections 2 and 101 b-1 of that Law (repeated again in Section 7 of Chapter 531, Exhibit "A", p. 5), which Sections declare it to be the policy of the State in enacting such Law to promote temperance in the consumption of alcoholic beverages. Section 2 of the Alcoholic Beverage Control Law further states that these provisions of the Law are enacted for the protection, health, welfare and safety of the people of the state. The setting of maximum prices bears no relationship to this purpose.

[fol. 14] 56. Section 9 of The New Act will not serve to cure the possibility of monopolistic and anti-competitive



practices (Exhibit "A", Section 8, p. 8) at which The New Act is directed.

57. Section 9 of The New Act contravenes the terms and policy of the Sherman Act, 15 U. S. C. §1-7.

58. Section 9 of The New Act is in direct conflict with the Robinson-Patman Act, 15 U. S. C. §13a, §13b, §21a, in that:

(a) Section 9 establishes price controls upon distillers, importers and wholesalers designated as agents whether or not their pricing policies tend to lessen competition, whereas the Robinson-Patman Act would permit such price controls *only* where, without such controls, competition among distillers, importers and wholesalers designated as agents would be lessened;

(b) Section 9 of The New Act fails to permit price differentials permitted by the Robinson-Patman Act, such as an adjustment of price to meet competition and an adjustment of price where there is sufficient cost justification for such a price;

(c) Section 9 would force distillers, importers and wholesalers designated as agents, in violation of the Robinson-Patman Act, to give discounts to purchasers in New York State although there would be no cost justification for such discounts and although such discounts would not be necessary to meet competition.

59. For the reasons described in paragraphs 57 and 58 above, Section 9 of The New Act directly conflicts with Federal Antitrust Laws and therefore must yield to the supremacy of such laws as required by Article VI of the Constitution of the United States.

[fol. 15] 60. Section 9 of The New Act violates the Articles of the Constitution of the United States by interfering with commerce among the states in that:

(a) The only practical way by which distillers, importers and wholesalers designated as agents can gather and

insure the reliability of information necessary to make the affirmations, is to establish and to control the price at which their brands are sold in all other states. This the plaintiffs could not do for in many states they would be violating the laws of those states and in any event they would be violating federal antitrust laws;

(b) Section 9 of The New Act is extraterritorial in its effect in regulating contracts which are made and are to be executed wholly beyond the boundaries of New York State;

(c) Section 9 of The New Act attempts to bestow an economic advantage upon the citizens of the State of New York at the expense of out-of-state vendors of liquor;

(d) As described in paragraph 53(c) of this complaint, distillers, importers and wholesalers designated as agents may be unable at any time to increase the price at which they sell their brands in New York State and in any event will be compelled to accord New York purchasers the pre-existing lower prices for a period of two or more months after a general price increase goes into effect.

61. Section 9 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States by discriminatorily imposing maximum price limitations upon sales made by distillers, importers and wholesalers dealing in national brands of liquor, while failing to impose such limitations upon:

[fol. 16] (a) sales made by persons dealing in liquor sold under "private labels";

(b) sales made by vintners and wholesalers of wine.

62. Paragraph 3.(a) of Section 7 of The New Act requires that no brand of liquor shall be sold to or purchased by a wholesaler irrespective of the place of sale or delivery unless a schedule as provided in that section is filed with the State Liquor Authority and is then in

effect. Such schedule must contain, among other things, "the net bottle and case price paid by the seller".

63. Paragraph 3.(a) of Section 7 of The New Act (Exhibit "A", p. 6) violates the Articles of the Constitution of the United States in that:

(a) By requiring schedules for sales "irrespective of the place of sale or delivery", paragraph 3.(a) interferes with commerce among the states and interferes with foreign commerce by requiring schedules to be filed in New York State by distillers, importers and wholesalers designated as agents as to the prices at which they sell brands in any other state whether or not such distiller also sells such brands in New York;

(b) By requiring schedules to contain the "net bottle and case price paid by the seller", paragraph labeled 3.(a) deprives plaintiffs of property without due process of law and is an arbitrary, capricious and unreasonable exercise of the state's police power. This requirement of paragraph 3.(a) in no way serves to carry out the policy of the Alcoholic Beverage Control Law as expressed in Section 2 of that Law.

**For a Separate and Distinct Second Cause of Action:**

64. Alpine Wine & Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 17] 65. Ben Perlow Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

66. Bison Liquor Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

67. Blue Crest Wine and Spirit Corp. is a domestic corporation organized and existing under the laws of the State of New York.

68. Bonny Distributing Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

69. Capital Distributors Corp. is a domestic corporation organized and existing under the laws of the State of New York.

70. Cardinal Distributors Inc. is a domestic corporation organized and existing under the laws of the State of New York.

71. Colony Liquor Distributors, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

72. Distilled Brands Inc. is a domestic corporation organized and existing under the laws of the State of New York.

73. Eber Bros. Wine & Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

74. Elmira Tobacco Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

75. Empire Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 18] 76. Graves & Rodgers, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

77. M. Lichtman & Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

78. Major Liquor Distributors Inc. is a domestic corporation organized and existing under the laws of the State of New York.

79. Monarch Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

80. Mullen & Gunn, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

81. Peerless Importers Corp. is a domestic corporation organized and existing under the laws of the State of New York.

82. Ramapo Wine & Liquor Corporation is a domestic corporation organized and existing under the laws of the State of New York.

83. Rodgers Liquor Co., Inc. is a domestic corporation organized and existing under the laws of the State of New York.

84. S & K Wine & Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

85. Standard Food Products Corp. is a domestic corporation organized and existing under the laws of the State of New York.

[fol. 19] 86. Standard Wine & Liquor Co. Inc. is a domestic corporation organized and existing under the laws of the State of New York.

87. Star Industries Inc. is a domestic corporation organized and existing under the laws of the State of New York.

88. Universal Liquor Corp. is a domestic corporation organized and existing under the laws of the State of New York.

89. The above plaintiffs listed in paragraphs 64 through 88 are wholesalers selling liquor to retailers within New York State and may be held to satisfy the definition of "related persons" in paragraph (f) of The New Act.

90. Plaintiff New York wholesalers reallege each and every allegation contained in paragraphs numbered 35, 36, 38 through 52, 53(a) (b), 54(a) (c), 55, 56, 57, 58(a) (b), 59 and 61 of this complaint with the same force and effect as if fully set forth herein.

91. Paragraph (f) of Section 9 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States in depriving New York wholesalers of liberty and property without due process of law in that New York wholesalers who may be "related persons" will be severely injured by being compelled to sell to retailers at artificial prices, irrespective of marketing conditions, net profit margins, and other factors which distinguish New York from other markets. In this respect the statute would vest complete control of New York wholesalers' prices in the hands of any one of thousands of wholesalers throughout the United States.

92. Section 65.7 of Rule 16 of the State Liquor Authority Rules and Regulations, as amended effective October 31, 1964, interprets paragraph (f) of Section 9 of The New [fol. 20] Act as requiring the filing of affirmations of the "wholesaler to retailer" price only as to sales by those New York wholesalers who satisfy the definition of "related persons" found in paragraph (f).

93. As Section 65.7 of State Liquor Authority Rule 16 interprets The New Act, New York wholesalers will not themselves be required to file affirmations, but if they qualify as "related persons" will be prohibited from selling brands in New York State until the brand owner or agent has filed an affirmation and furnished them with a copy of his affirmation.

94. Paragraph (f) of Section 9 of The New Act, for the following reasons, is an arbitrary, capricious and unreasonable exercise of the state's police power:

(a) Paragraph (f) of Section 9 of The New Act, and particularly the regulations of the State Liquor Authority interpreting how that paragraph is to be applied, make a New York wholesaler's right to sell at any price he chooses in New York State dependent upon whether or not he has satisfied the definition of "related person". If he is a "related person", he will be prohibited from selling until an affirmation has been filed by the brand owner or wholesaler designated as agent.

(b) The definition of "related person" in paragraph (f) of Section 9 of The New Act is so vague that New York wholesalers are unable to determine if they are "related persons" within the meaning of The New Act.

(c) New York wholesalers have no power to compel brand owners or wholesalers designated as agents to file the required affirmations. If a New York wholesaler is a "related person" and affirmations pertaining to some brands are not filed, he will be prohibited from selling those brands during the period for which such affirmation would have been in effect.

[fol. 21] (d) With insufficient guidance from the definition of "related person" found in paragraph (f) of Section 9 of The New Act, New York wholesalers are nevertheless compelled to determine whether or not they are "related persons".

95. A New York wholesaler who is considered to be a "related person", as a practical matter, must insure that the price at which he sells an item of liquor to retailers is no higher than the price at which a person related to the brand owner or a wholesaler designated as agent is selling such item of liquor to retailers in other states. This will require consultation between the brand owner or wholesaler designated as agent on the one hand and the wholesaler who is a "related person" on the other to make the affirmation required by paragraph (f) of Section 9 of The New Act which is likely to cause unwitting violations of



the laws of New York and of other states and of the federal antitrust laws.

96. Paragraph (g) of Section 9 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States in that it is so vague and indefinite that plaintiff New York wholesalers cannot know whether or not they are required to file affirmations as required by that paragraph.

97. State Liquor Authority Rule 16, §65.7, as amended effective October 31, 1964, requires only persons who are not "related persons", as that term is defined in paragraph (f) of Section 9 of The New Act, to file affirmations pursuant to paragraph (g). Rule 16 also requires that a "representation" must be given by a person filing an affirmation pursuant to paragraph (g) that he is not a "related person".

98. If the State Liquor Authority's interpretation of paragraph (g) of Section 9 of The New Act is correct, a [fol. 22] person signing an affirmation pursuant to paragraph (g) may be criminally prosecuted if he innocently misdefines his company as not being a "related person".

#### For a Separate and Distinct Third Cause of Action:

99. Hiram Walker Distributors Inc. is a domestic corporation organized and existing under the laws of the State of New York.

100. Julius Wile Sons & Company, Inc. is a domestic corporation organized and existing under the laws of the State of New York.

101. The Paddington Corporation is a domestic corporation organized and existing under the laws of the State of New York.

102. National Distillers and Chemical Corporation is a foreign corporation organized and existing under the laws



of the State of Virginia, duly qualified to do business in the State of New York.

103. Knickerbocker Liquors Corp. is a domestic corporation organized and existing under the laws of the State of New York.

104. Wayne Liquor Corp. is a foreign corporation organized and existing under the laws of the State of Delaware, duly qualified to do business in the State of New York.

105. Plaintiffs listed in paragraphs 99, 100, 101, 102, 103 and 104 are persons selling directly to retailers within New York State in whom a brand owner or wholesaler designated as agent has an interest, direct or indirect. These plaintiffs, therefore, are "related persons" within the definition supplied by paragraph (f) of Section 9 of The New Act.

[fol. 23] 106. Plaintiff "related person" New York wholesalers reallege each and every allegation contained in paragraphs of this complaint numbered 35, 36, 38 through 52, 53(a)(b), 54(a)(c), 55, 56, 57, 58(a)(b), 59, 61, 91, 92, 93 and 94(a), with the same force and effect as if fully set forth herein.

107. Paragraph (f) of Section 9 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States in that it deprives the above-described plaintiffs of equal protection of the laws by imposing maximum price limitation upon sales of certain brands by these "related person" New York wholesalers while failing to impose similar restrictions upon sales of the same brands by "non-related person" New York wholesalers.

For a Separate and Distinct Fourth Cause of Action:

108. The American Distilling Company, Austin Nichols & Company, Inc., Bacardi Imports, Inc., Barton Distilling

Company, Brown-Forman Distillers Corporation, Canada Dry Corporation, The Fleischmann Distilling Corporation, Glenmore Distilleries Company, James B. Beam Distilling Company, McCormick Distilling Company, Mr. Boston Distiller, Inc., National Distillers and Chemical Corporation, Schenley Industries, Inc., Joseph E. Seagram & Sons, Inc., Star Hill Distilling Company, Stitzel-Weller Distillery, Inc., W. A. Taylor & Company and "21" Brands, Inc., are persons who manufacture and bottle liquor, rectify and bottle liquor, or import liquor in bulk from foreign sources and bottle it domestically.

109. Plaintiffs listed in paragraph 108 above reallege each and every allegation contained in paragraphs numbered 1, 2, 3, 4, 6, 7, 8, 13, 14, 16, 19, 21, 22, 23, 26, 28, 31 through 52 of this complaint with the same force and effect as if fully set forth herein.

[fol. 24] 110. Paragraph 3(a) of Section 7 of The New Act requires that no brand of liquor shall be sold to or purchased by a wholesaler unless a schedule as provided in that section is filed with the State Liquor Authority and is then in effect. Such schedule must contain among other things "the net bottle and case price paid by the seller".

111. Paragraph 3(a) of Section 7 of The New Act violates the Articles of the Constitution of the State of New York and the Articles of the Constitution of the United States in that it arbitrarily, capriciously and unreasonably requires manufacturers and bottlers of liquor as well as importers of liquor in bulk to file a bottle and case price at which they purchased such liquor, when in fact no such price exists and compliance is therefore impossible.

112. Rule 16, §65.69, of the State Liquor Authority Rules and Regulations, as amended effective October 31, 1964, attempts in part to cure the above defect by excluding manufacturers from those required to furnish the "net bottle and case price paid by the seller".

113. The State Liquor Authority has no legislative authority to cure the defect of paragraph 3.(a) of Section 7 of The New Act. Manufacturers of liquor and importers of liquor in bulk may nevertheless be bound by the plain language of the requirement of paragraph 3.(a) even though compliance by them will be impossible.

114. If the plaintiffs described above fail to furnish their non-existent "net bottle and case price paid by the seller" for brands which they manufacture or import in bulk, they will be prohibited by paragraph 3.(a) from selling those brands in New York State.

Wherefore, plaintiffs state that they have no adequate remedy at law, and demand judgment against the defendants:

[fol. 25] (a) Decreeing and declaring that the provisions of Section 9 New York Session Laws, 1964, Ch. 531, are unconstitutional and void.

(b) Decreeing and declaring that that part of paragraph 3.(a) of Section 7 New York Session Laws, 1964, Ch. 531, requiring that the schedules of prices to wholesalers contain the "net bottle and case price paid by the seller", is unconstitutional and void.

(c) Decreeing and declaring that that part of paragraph 3 (a) of Section 7 New York Session Laws, 1964, Ch. 531, requiring that "No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule is filed" is unconstitutional and void insofar as it may require schedules of prices of sales to wholesalers in other states than New York.

(d) Enjoining and restraining the defendants and their successors from imposing any sanctions or penalties for failure to submit the affirmations and verifications required by Section 9 of Chapter 531 of the Laws of 1964.

(e) Enjoining and restraining the defendants and their successors from imposing any sanctions or penalties for failure to file the "net bottle and case price paid by the seller" and for failure to file schedules of prices of sales to wholesalers in states other than New York as required by Section 7 New York Session Laws, 1964, Ch. 531.

[fol. 26] (f) Granting such other and further relief as may be just and proper, together with the costs of this action.

Lord, Day & Lord, Attorneys for Plaintiffs.

(Verified by Frederick J. Lind, Charles Guttman and George Goldstein, October 27 and 28, 1964.)

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[fol. 27]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

At Chambers

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Albany, at the Court House, Albany, New York, on the 29 day of October, 1964.

Present: Hon.

Justice.

ORDER TO SHOW CAUSE

Upon reading and filing the annexed affidavit of Thomas F. Daly, duly sworn to on the 28th day of October, 1964 and the annexed affidavits of Frederick J. Lind, R. R. Herrmann, Jr., Joseph D. Cotler, D. L. Street, Raymond Revit, Walter J. Devlin, Ira R. Schattman, Jr., Frank T. Hypps, Jack Goodman, Jack W. Marer, Chester F. McNamara, and Charles W. Sand all duly sworn to and copies of the summons and complaint hereto attached, let the defend-

ants, Donald S. Hostetter, John C. Hart, William H. Morgan, Benjamin H. Balcom, Robert E. Doyle and Louis J. Lefkowitz, show cause before one of the justices of this Court, at a Special Term of this Court, held in and for the County of Albany, at the Court House, Albany, New York, on the 13th day of November, 1964, at the opening of court on that day or as soon thereafter as counsel can be heard, why an order should not be made and entered herein restraining the defendants, Donald S. Hostetter, John C. Hart, William H. Morgan, Benjamin H. Balcom, Robert E. Doyle and Louis J. Lefkowitz, pending the determination of the issues in this action from:

1. Requiring plaintiffs to comply in any manner with any part of Section 9, New York Session Laws, 1964, Ch. 531;

[fol. 28] 2. Requiring those plaintiffs who sell their brands of liquor to wholesalers located in other states as well as to wholesalers in the State of New York to file a schedule of prices at which such liquor is sold to wholesalers in states other than New York "irrespective of the place of sale or delivery" as required by Section 7, New York Session Laws, 1964, Ch. 531.

3. Requiring plaintiffs to include in their schedule of prices filed pursuant to Section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by the seller" as required by Section 7, New York Session Laws, 1964, Ch. 531; and it is further

Ordered, that in the meantime and until the hearing and determination of this motion and the entry of an order thereon, the defendants, Donald S. Hostetter, John C. Hart, William H. Morgan, Benjamin H. Balcom, Robert E. Doyle and Louis J. Lefkowitz be and they are hereby stayed, enjoined and restrained from:

1. Requiring plaintiffs to comply in any manner with any part of Section 9, New York Session Laws, 1964, Ch. 531.

2. Requiring those plaintiffs who sell their brands of liquor to wholesalers located in other states as well as to wholesalers in the State of New York to file a schedule of prices at which such liquor is sold to wholesalers in states other than New York "irrespective of the place of sale or delivery" as required by Section 7, New York Session Laws, 1964, Ch. 531.

3. Requiring plaintiffs to include in their schedule of prices filed pursuant to Section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by the seller" as required by Section 7, New York Session Laws, 1964, Ch. 531.

[fol. 29] Sufficient reason appearing therefor, let service of a copy of this order and the papers upon which it is based upon the defendants on or before October 30, 1964, at 4 P.M. be deemed good and sufficient service thereof.

Enter

Russell G. Hunt, J. S. C.

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IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF THOMAS F. DALY, READ IN SUPPORT OF MOTION  
State of New York,  
County of New York, ss.:

Thomas F. Daly, being duly sworn, deposes and says:

1. I am a member of the firm of Lord, Day & Lord, attorneys for the plaintiffs in the action and am fully familiar with all the facts and circumstances involved in this proceeding.

2. I make this affidavit in support of an application for a preliminary injunction and for a temporary restraining order pending the hearing and determination of the motion for a temporary injunction.

3. The action seeks to have certain parts of Section 7 and the entirety of Section 9 of Chapter 531 of the Laws of 1964 declared unconstitutional as being violative of the commerce and supremacy clauses of the Constitution of [fol. 30] the United States and violative of the due process and equal protection clauses of the Constitution of the State of New York and the United States.

4. Subdivisions 3(a) and (b) of Section 101-b of the Alcoholic Beverage Control Law as amended by Section 7 of Chapter 531 provide for the filing of price schedules with the State Liquor Authority of all brands sold in New York to wholesalers or retailers.

5. Subdivisions (d) and (f) of Section 9 of Chapter 531 provide that for each brand of liquor sold in New York, the owner of such brand or the wholesaler designated as agent must, in addition to the aforesaid price schedules, also file a verified affirmation that the "bottle and case price of liquor to wholesalers" (or retailers) "is no higher than the lowest price at which such item of liquor was sold by such brand owner, such wholesaler designated as agent or any related person to any wholesaler" (or retailer) "anywhere in any other state of the United States or the District of Columbia \* \* \*."

6. Subdivision (i) of Section 9 of Chapter 531 says that "in determining the lowest price \* \* \* appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler \* \* \* or retailer \* \* \*."

7. Subdivision (d) of Section 9 of Chapter 531 defines "a related person" as "any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial



business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated [fol. 31] as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands."

8. These provisions of Chapter 531 become effective on October 31, 1964. The State Liquor Authority in implementing the law has recently promulgated, among others, Rule 16 as amended, which likewise becomes effective on October 31, 1964. It requires a brand owner, or its designated wholesale agent, to file the aforesaid duly verified affirmation by December 1, 1964, showing the lowest price at which a brand included in the schedule filed pursuant to subdivisions 3(a) and (b) of Section 101-b was sold in any other state or in the District of Columbia during November 1964.

9. As appears from the moving affidavits, if its operation is not enjoined pending the testing of its constitutionality, the law as implemented by the regulations will require brand owners, importers and wholesalers who are designated as agents of brand owners, in many instances to reorganize entirely their sales and accounting staffs, to establish price reporting procedures which must be able to report accurately every price charged for each brand of liquor during a monthly period, and to install or attempt to install various other procedures in an effort to ascertain the lowest price at which their brands were sold at any time anywhere in the United States or the District of Columbia during the month of November. These procedures will not only be disruptive of the internal structures of many plaintiffs during the month of November, which is the start of the high sales Christmas period, but it will also involve considerable monetary expense in its initiation. Because of the serious doubts as to the constitutionality of Section 9 of Chapter 531, plaintiffs should not be forced to bear this expense and organizational disruption.

[fol. 32] 10. In addition to being forced to enact severe internal changes in November 1964, those plaintiffs who



must file price affirmations on December 1, 1964 will be required to institute a completely new system of price reporting which will involve an unknown number of wholesalers throughout the United States. These "related person" wholesalers must be contacted and asked to report to the plaintiffs concerned the lowest price at which they sold each of the brands of a particular distiller during the month of November. The expense to plaintiffs in installing this totally new system will be considerable, but they also face injury in the form of loss of good will of independent wholesalers who, for their own business reasons, do not wish to divulge such information to plaintiffs.

11. As the moving affidavits submitted herein show, the term "related persons" as defined in Chapter 531 is exceedingly vague and none of the plaintiffs knows to whom it will apply. Because of this there is a complete lack of knowledge as to whether or not verified affirmations required by the Act should be filed with respect to sales that are made throughout the country to a great number of wholesalers and retailers.

12. So too, as pointed out in the moving affidavits, a "related person" may and probably in most cases will be completely independent of the wholesaler or the brand owner, neither one of whom will be in a position to compel, short of applying sanctions which would be prohibited by Federal antitrust legislation, such "related persons" to disclose to them the lowest price at which he has sold their brands during a particular month.

13. It will also, in many instances be impossible to ascertain the lowest price at which a particular brand is sold in any month because of the vagueness that results from the language of the statute concerning how the lowest price for any given brand is to be determined. For instance, [fol. 33] the phrase "other inducements of any kind whatsoever" is, as pointed out in the moving affidavits, completely meaningless in assisting a brand owner or a wholesaler designated as agent to arrive at a determination of the

price at which a particular brand is sold in any particular month. There are many practices which are not considered by the industry to be inducements but rather general advertising and promotional expense which the State Liquor Authority might say are inducements given and thus must be reflected in the price. As also pointed out in the moving affidavits, many of these promotions run for more than a month so that even if their cost was to be charged against a brand it would not be known until sometime after the affirmation had to be made what the actual charge against that brand should have been. For the many reasons set forth in the papers herein, it is extremely doubtful whether anyone will be able to devise any system which could be relied upon by November 1, 1964 or later to tell the person required to verify the affirmation that the information contained upon which he is relying is accurate and that the price quoted is, in fact, the lowest price at which the brand referred to was sold during the previous month.

14. As can readily be appreciated, the changes, the work, the studies and the other moves that will be required in an attempt to establish the price at which liquor was sold throughout this country will be extensive, arduous and, in many instances, futile ones. Furthermore, the gathering of price information by plaintiffs in order to ascertain their New York prices calls for private conduct which the Sherman Act forbids.

15. Accordingly, no matter how extensive or expensive the efforts of the people concerned may be, it is problematical whether the information thus obtained will be reliable. As a result, they will be faced with the choice [fol. 34] of not selling their brands in New York or of asking one of their officials to make a verified affirmation knowing that he may be asked to verify unreliable or untrustworthy facts, thus individually incurring criminal sanctions while his company may suffer the other penalties imposed by law (see: Alcoholic Beverage Control Law, Section 101-b-6; subdivisions [h] and [j] of Section 9 of Chapter 531).

16. Prior to the enactment of Chapter 531, the liquor industry in the State of New York was the subject of a Moreland Act Commission study. The aforesaid provisions of Section 9 of Chapter 531 of the Laws of 1964, to the constitutionality of which objections are being made in this action, were contained in Senate Introductory No. 273 (annexed hereto as Exhibit "A") introduced by Senator Zaretzki. At a public hearing held in Albany on February 26, 1964, before the Joint Legislative Committee to Study the Alcoholic Beverage Control Law and the Senate and Assembly Excise Committees, Senator Zaretzki requested the Honorable Lawrence E. Walsh, Chairman of the Moreland Act Commission, to furnish the Committees with certain additional information with respect to the proposals contained in his bill, including the questioned proposals which were eventually enacted into law. The Moreland Act Commission, through its special counsel, William W. Golub, gave such information in a letter addressed to Senator John J. Marchi, a copy of which is annexed hereto as Exhibit "B." In that letter Mr. Golub in remarking on what are referred to herein as the constitutionally objectionable parts of the bill, said:

"There is substantial doubt as to the constitutionality of the bill amended as indicated above. The distillers have brought an action to review the constitutionality of a similar statute in Kansas. They contend that, [fol. 35] in the light of the complicated economic issues sought to be dealt with, the statute is too vague and indefinite to satisfy due process requirements. In addition, they contend that the statute violates the commerce clause of the United States constitution because it is an attempt by one state to control national pricing. A preliminary injunction restraining the enforcement of the statute was granted by a Kansas court in June 1961 and is still in force."

The Kansas case referred to is an unreported decision of the Third Judicial District of Kansas, Topeka, Kansas,

rendered May 7, 1964, which held a Kansas maximum liquor pricing act similar to Section 9 of Chapter 531 unconstitutional because of violations of the commerce, due process and equal protection clauses of the Constitution of the United States and the due process and equal protection clauses of the Constitution of the State of Kansas.

17. The minutes of the aforesaid meeting of February 26th indicate that in response to questioning from Senator Zaretzki, Judge Walsh indicated his doubts as to the constitutionality of those provisions. He stated:

"If the provision were constitutional, if it were enforceable, you could save perhaps the distiller's share of that. But you couldn't save the wholesaler's and retailer's share and the consumer still wouldn't get his dollar back" (p. 37, Transcript of Minutes of Public Hearing).

18. In response to further questioning from Senator Zaretzki, Judge Walsh made the following additional statement:

"This would be really a hopelessly unenforceable job. It would mean that the New Yorker is supposed to run around checking prices in 50 states, and the Anti-[fol. 36] Trust Division of the Department of Justice can't do that, even with the F.B.I. to help them. I think it would be really a vain effort. I mean the State Liquor Authority has enough hopeless jobs to do without giving it another one" (p. 38, Transcript of Minutes of Public Hearing).

19. Annexed hereto as Exhibit "C" are excerpts of the pertinent parts of the transcript which Judge Walsh made in the Stenographer's Transcript of the Hearing.

20. In connection with this action for a temporary injunction, there are also annexed hereto as exhibits the following:

Exhibit "D"—Study Paper No. 5 entitled Resale Price Maintenance in the Liquor Industry, dated October 28, 1963;

Exhibit "E"—Copy of Report and Recommendation No. 3 entitled Mandatory Resale Price Maintenance, dated January 21, 1964, containing the conclusions and recommendations of the Moreland Act Commission relative to this proceeding;

Exhibit "F"—Copies of the Governor's Messages to the Legislature dated February 10, 1964, and April 16, 1964.

21. Former Section 101-c of the Alcoholic Beverage Control Law, as amended by Chapter 689 of the Laws of 1950, provided for mandatory resale price maintenance of liquor at the retail level. The mandatory resale price was enforced by the State Liquor Authority. In short, under the prior law, retailers could only sell to the public at a price fixed by the distiller, and sales at such fixed prices were enforced by the New York State Liquor Authority.

22. The Moreland Act Commission arrived at the conclusion that this so-called mandatory price maintenance [fol. 37] resulted in the New York consumer paying approximately \$1.00 more a fifth than generally was paid elsewhere in the country (see Exhibit "E," p. 30) and recommended repeal of the mandatory price fixing provisions. Section 11 of the present law did so. In so doing, the Legislature said (Section 8 of the present law): "Enactment of Section 11 of this Act [i.e., the section repealing the mandatory price maintenance provisions of the former law] will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state." But the Legislature went on to say in Section 8 that the maximum price provisions of Section 9 of Chapter 531 are necessary "In order to forestall possible monopolistic and anti-competitive practices designed to frustrate

the elimination of such discrimination and disadvantage \* \* \*."

23. In other words, the objectionable features of Chapter 531 of the Laws of 1964 are not designed to correct a situation which may lead to intemperance or a presently existing social evil or to presently give the public the benefits of open competition, but rather to forestall possible monopolistic and anti-competitive practices not presently in being, but which may occur in the future.

24. It is difficult, therefore, to see how any great injury can be done to the State or to the people thereof by suspending the operation of those sections of the law objected to here pending the disposition of this action.

25. For all of the reasons stated in the moving affidavits, it is apparent that irreparable injury will be suffered by the plaintiffs if a temporary injunction is not granted pending the testing of the constitutionality of those parts of the law which are objected to in this action.

26. For the reasons set forth above, it is respectfully requested that pending the outcome and determination of the motion for a temporary injunction, a stay of the enforcement of the aforesaid provisions also be granted.

[fol. 38] 27. No previous application for the relief sought herein has been made.

(Sworn to by Thomas F. Daly, October 28, 1964.)

EXHIBIT A, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY  
STATE OF NEW YORK

Print. 273

Intro. 273

IN SENATE

(Prefiled)

January 8, 1964

—  
Introduced by Mr. ZARETZKI—read twice and ordered  
printed, and when printed to be committed to the Com-  
mittee on Excise

AN ACT

To amend the alcoholic beverage control law, in relation  
to information to be contained in schedules of prices for  
liquor and wine filed with the liquor authority.

*The People of the State of New York, represented in  
Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section one hundred  
one-b of the alcoholic beverage control law is hereby  
amended by adding thereto a new paragraph, to be para-  
graph (f), to read as follows:

[fol. 39] *(f) No manufacturer or wholesaler may file a  
schedule pursuant to this section offering for sale any item  
or brand which is offered for sale by such manufacturer or  
wholesaler, or subsidiary thereof, in any jurisdiction in any  
state of the United States at a price, exclusive of state  
taxes, lower than offered in this state for the same period,  
except that differentials may be made to allow for differ-  
ences in actual costs of shipment f.o.b. place of original  
warehouse.*



*Manufacturers and wholesalers shall at all times keep upon their licensed premises a schedule of prices at which the item or brand is being offered for sale throughout each of the other states.*

§2. This act shall take effect June first, nineteen hundred sixty-four.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

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## STATE OF NEW YORK

Print. 273, 4518

Intro. 273

IN SENATE

(*Prefiled*)

January 8, 1964

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Introduced by Mr. ZARETZKI—read twice and ordered printed, and when printed to be committed to the Committee on Excise—committee discharged, bill amended, ordered reprinted, as amended and recommitted to said committee

[fol. 40]

## AN ACT

To amend the alcoholic beverage control law, in relation to information to be contained in schedules of prices for liquor and wine filed with the liquor authority.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section one hundred one-b of the alcoholic beverage control law is hereby amended by adding thereto a new paragraph, to be paragraph (f), to read as follows:

(f) *No manufacturer or wholesaler may file a schedule pursuant to this section offering for sale any item or brand which is offered for sale by such manufacturer or wholesaler, or subsidiary thereof, in any jurisdiction in any state of the United States at a price, exclusive of state taxes, lower than offered in this state for the same period, except that differentials may be made to allow for differences in actual costs of shipment f.o.b. place of original warehouse.*

*Manufacturers and wholesalers shall at all times keep upon their licensed premises a schedule of prices at which the item or brand is being offered for sale throughout each of the other states and shall, from time to time as may be necessary, file with the liquor authority, under oath, a statement that the price at which each such brand or item is being offered for sale in this state is as low as the lowest price at which the same is being offered for sale in any other state.*

*The liquor authority shall establish and from time to time as may be necessary amend schedules establishing maximum prices at which any item or brand may be sold or offered for sale in this state at retail, which shall be sufficient to provide the retailer a reasonable return and at the same time protect the purchaser against excessive and unreasonable retail prices.*

[fol. 41] §2. This act shall take effect June first, nineteen hundred sixty-four.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

## STATE OF NEW YORK

Print. 273, 4518, 4604

Intro. 273

## IN SENATE

*(Prefiled)*

January 8, 1964

Introduced by Mr. ZARETZKI—read twice and ordered printed, and when printed to be committed to the Committee on Excise—committee discharged, bill amended, ordered reprinted, as amended and recommitted to said committee—committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

## AN ACT

To amend the alcoholic beverage control law, in relation to information to be contained in schedules of prices for liquor and wine filed with the liquor authority.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section one hundred one-b of the alcoholic beverage control law is hereby amended by adding thereto a new paragraph, to be paragraph (f), to read as follows:

[fol. 42] (f) *No manufacturer or wholesaler may file a schedule pursuant to this section offering for sale any item or brand which is offered for sale by such manufacturer or wholesaler, or subsidiary thereof, in any jurisdiction in any state of the United States at a price, exclusive of state taxes, lower than offered in this state for the same period, except that differentials may be made to allow for differences in actual costs of shipment f.o.b. place of original warehouse. In computing prices for any of the purposes of this subsection, no allowance shall be made for advertising.*

depletion and promotional allowances or rebates of any kind whatsoever made to purchasers by the vendor.

Manufacturers and wholesalers shall at all times keep upon their licensed premises a schedule of prices at which the item or brand is being offered for sale throughout each of the other states and shall, from time to time as may be necessary, file with the liquor authority, under oath, a statement that the price at which each such brand or items is being offered for sale in this state is as low as the lowest price at which the same is being offered for sale in any other state.

The liquor authority shall establish and from time to time as may be necessary amend schedules establishing maximum prices at which any item or brand may be sold or offered for sale in this state at retail, which shall be sufficient to provide the retailer a reasonable return and at the same time protect the purchaser against excessive and unreasonable retail prices.

§2. This act shall take effect June first, nineteen hundred sixty-four.

EXPLANATION—Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

[fol. 43]

EXHIBIT B, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY  
NEW YORK STATE MORELAND COMMISSION ON  
THE ALCOHOLIC BEVERAGE CONTROL LAW

230 PARK AVENUE

NEW YORK 17, NEW YORK

MU 9-4822

March 9, 1964

Hon. John J. Marchi  
Chairman, Joint Legislative Committee  
for the Study of the Alcoholic Beverage Control Law  
State Capitol  
Albany, New York

Re: *S. Int. 273*

Dear Senator Marchi:

At the request of the Moreland Commission, I take the liberty of submitting to you in this letter an analysis of S. Int. 273. At the hearing before the Joint Committee and the two Excise Committees on February 26, Senator Zaretski, the introducer of S. Int. 273, raised certain questions about that bill. Those questions will be considered in this letter.

S. Int. 273 would require a distiller to sell any brand of whiskey to his New York wholesalers at the lowest "price" at which he sells that brand in any other state during the month in which the sale occurs. The bill is designed to prevent distillers from discriminating against New York wholesalers by selling at lower "prices" in other states.

1. The fatal defect of S. Int. 273 is that it leaves the distillers in complete control of consumer prices. It would not in any way obligate the distillers to reduce the retail [fol. 44] prices fixed by them. Even if the prices they

charge wholesalers were reduced, high retail prices could continue to be imposed by the distillers. Unless mandatory resale price maintenance is repealed, lower distiller prices could merely mean higher profits for wholesalers and retailers with no benefit to consumers.

2. A vital shortcoming of this bill in accomplishing even its limited objective is its use of the word "price." It is established industry practice to interpret the word "price" to mean invoice price (f.o.b. distillery). "Price" thus means something altogether different from the distiller's actual realization or the wholesaler's actual cost after giving effect to the various allowances and other forms of assistance granted by the distiller to the wholesaler. "Price" or invoice price is, as the distillers claim, essentially uniform throughout the country except for a minor reduction to the monopoly states. As a result, the bill in its present form would merely bring distillers' prices in New York into parity with their prices in the monopoly states.

3. The experience of the monopoly states, which have provisions in their contracts with distillers analogous to S. Int. 273, demonstrates the ineffectiveness of this type of requirement. The prices charged to monopoly states are only about 4¢ to 12¢ a fifth below the New York invoice prices. They do not reflect the lower actual realizations of the distillers in markets where allowances are granted to wholesalers.

4. S. Int. 273 might be amended so as to reflect in the distillers' "prices" the various types of allowances and assistance they give wholesalers. In that event, the usefulness of the bill would be undermined by the extremely expensive and complicated enforcement problems it would present. The State would be required to engage a large corps of accountants and lawyers for full-time employment [fol. 45] in reviewing the books, records, accounts, and nation-wide transactions of each distiller. This task would have to be conducted on a regular and continuous basis,

and would involve even more complex problems than the State's present supervision of utility companies.

Effective enforcement would require a determination of the amount that each distiller actually realizes from his sales each month in each of the 49 other states. This would mean, in the first instance, an analysis of the myriad transactions between each distiller and each of his wholesale customers. In addition, it would undoubtedly necessitate the exploration of transactions with other persons, such as the wholesalers' salesmen. Many of these others, since they would be outside of New York, might not be subject to subpoena. In addition, to determine whether the distillers were making more money on their New York sales than on their sales elsewhere, it would be necessary to make detailed determinations as to their costs and the allocation of those costs.

It is apparent, therefore, that the enforcement of the law would lead to a series of involved and expensive administrative proceedings, not unlike utility rate cases, in which a morass of data would be presented and extremely complex issues would have to be resolved. The expense of enforcement would be mammoth and enforcement might well bog down under its own weight. In addition, because of the types of issues involved, there would be a tremendous inducement to attempt to corrupt the persons with the decision-making powers.

5. There is substantial doubt as to the constitutionality of the bill amended as indicated above. The distillers have brought an action to review the constitutionality of a similar statute in Kansas. They contend that, in the light of the complicated economic issues sought to be dealt with, the [fol. 46] statute is too vague and indefinite to satisfy due process requirements. In addition, they contend that the statute violates the commerce clause of the United States constitution because it is an attempt by one state to control national pricing. A preliminary injunction restraining the enforcement of the statute was granted by a Kansas court in June 1961 and is still in force.



6. If the purpose of this bill is to bring to New Yorkers the benefits of lower consumer prices, the simplest, most direct, and the only completely effective way of achieving this objective is to return to free competition. The experience in Washington, Chicago, St. Louis, Miami, and Houston demonstrates that the level of consumer prices can be brought to more than \$1 a fifth below New York prices where a free market is permitted to reign. None of these cities has any law resembling S. Int. 273. With free competition, no such legislation is necessary. A free market is a built-in regulator of prices. Consumer prices and distiller prices will both be reduced to their proper economic levels by the natural regulations of the free market.

Respectfully yours,

WILLIAM W. GOLUB

Copies to: All Members of the Joint Legislative Committee  
for the Study of the Alcoholic Beverage Control  
Law and of the Senate and Assembly Excise  
Committees

[fol. 47]

EXHIBIT C, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY

• • • • •  
hearings in the '30's. In 1948, as I said, Chairman O'Connell and the State Liquor Authority decided to declare another moratorium rather than put up with the charges and counter-charges that they were being subjected to.

In 1952 the Crime Commission found misconduct and then Irwin Shapiro at the beginning of the Harriman Administration made an investigation. There were fifteen resignations, many of them after people had claimed the Fifth Amendment. And now we have District Attorney Rogan's investigation.

This led to our appointment as a Commission. And we, having been introduced into this responsibility because of

these charges of corruption, have looked to see whether, in the law, there was any basis for them. And we have found the basis, we think, in these subjective standards, these unworkable and unrealistic provisions which an agency is directed to enforce when it knows it can't enforce them.

And then we have also disclosed, I think, a broader, a more subtle form of corruption where an agency of essentially honest men are really brainwashed by an industry and led from the objectives for which they were appointed and which the law was directed to into new objectives which are not in the law any more. Now this is a very subtle thing and the damages that have occurred to this State as a result of it are significant.

The objective of this law as it is now written is temperance.

That's the only justification for the law. Well it's been an utter failure in that because consumption rates in New York have gone up along with those of the Nation. They have paralleled them; indeed of stores, I think, ever since repeal—about 400 in my recollection.

Q. So perhaps in that one respect the conditions are not identical. A. Well, we have the same here, of course, now. [fol. 48] Q. But not identical in the sense that we would not be duplicating the same situation that exists in Washington if we had on the one hand a doing away with price maintenance and then unlimited issuance of licenses. A. Then we would have made both changes, whereas Washington has only one. On the other hand, in St. Louis, Missouri you have exactly that situation. Missouri does have an unlimited number of stores and the freedom from price restriction.

Q. Now I notice in some of these prices (referring to the chart)—I just go to Dallas and New York because they're next to each other—in some cases if you add the tax New York comes out cheaper, in other cases there's a marked difference and Dallas is considerably cheaper. A. The interesting thing is between Dallas and Houston. There is a completely different result.

Q. Well we have J & B comes out about even, doesn't it? Fleischman is cheaper. We're not accomplishing anything here, really.

But I think Dallas is much higher than Houston, for some reason. A. There may be other factors.

Q. There may be other factors there, that's right. But we put both of them in. A. Do you find that in the range of alcoholic beverages there is a substantial difference on the price charged by the distillers going into the various states? And again I am referring to the very probative point raised by Senator Zaretzki.

Q. I'm sure we have not attempted to find out how the excess is divided among the distiller, wholesaler and retailer. All we say is that you cannot assume that the distiller has a uniform price because he has a uniform price scale. A. This is not to depreciate the work done by Dr. Wattel, but on the discussion of price and consumption—and of course you brought out in your report there may be other answers to this—if his point was valid that price does affect consumption, there may be other remedies to meet that situation.

[fol. 49] Q. I think Dr. Wattel speaks of consumption in the matter of sales. But that doesn't mean there's an increase in consumption. If customers start buying in New York instead of New Jersey, they aren't drinking any more, just buying in New York instead of New Jersey. And I'm sure that happens in Washington, that people in the surrounding areas who work in Washington buy in the Washington stores to save money. A. You don't think that the public likes to get a bigger bang for the buck?

Q. The bang seems to be limited by things other than the buck. You can only take so much of it. A. The Toronto School of Research has been conducting surveys that would indicate some relationship between the

income and the incidence of cirrhosis of the liver. Now just what value this has I don't know, but in this connection I was wondering whether Professor Wattel

did have a control committee to establish the validity of the system of survey. Now his report states that

Q. The retail price will still be as high as they want to make it. But wait a minute—I didn't get that far. My bill doesn't—now, you put your finger on what I think is the nub of the thing. You permit the distiller not only to charge what he wants to, but you give him the right to tell the retailer, "You must charge so much." If you take that power away from him, and he can't do that, now can't you pass on the saving to the consumer by requiring the State Liquor Authority to set the mark-up price, a fair mark-up price to the retailer and to the consumer? Not the retailer, but the consumer. A. Then what you'd have to have is an agency like the Public Service Commission with conduct of rate studies and service studies, and you'd have a complicated agency to do that which a free market would do for us for nothing. See, in the case of a public utility where only one power company can serve an area efficiently, you need the regulation of a monopoly, but [fol. 50] when anybody can sell liquor what we can't understand is why you need that type of regulation. Let anybody come in and sell it and sell as cheaply as they can, the way they do in St. Louis.

Q. I admit there are two ways of doing it: your's is one way and I'm trying to find out whether mine is another way. A. I think that your's is at most a supplement to my way, but it would not be a substitute for it.

Q. Well if we compelled the distiller to charge as low a price as anywhere, and then the State Liquor Authority fixes a fair mark-up, giving the retailer a living wage, and still saving the consumer the dollar or two. And I can go to Bennington, Vermont and save two dollars a bottle. A. You can get some pretty good bargains if you shop around the country.

Q. Well I regret to tell my constituents who are here in large numbers that I buy a lot of liquor in Bennington, Vermont. A. Only in the summertime, Senator.

Q. But the point is that we could save the consumer the \$150,000,000 by making the distiller charge us no more

than he does in any other state, and then having the State Liquor Authority fix a fair mark-up, fair for the consumer, and fair for the retailer. A. If the provision were constitutional, if it were enforceable, you could save perhaps the distiller's share of that. But you couldn't save the wholesaler's and retailer's share and the consumer still wouldn't get his dollar back.

Q. Wait a minute, I'm coming to that. I've been talking about a sale from the distiller to the retailer and then to the consumer. And now we have an intermediate group known as wholesalers or distributors. Did your study show that most of these distributors are owned by the distillers? A. No. We have not checked into that.

Q. Well, will you make a note of that too? A. You've given us quite a bit of work. May I borrow a pencil, Mr. Chairman? I don't think you're going to find in New [fol. 51] York any interlocking ownership. You may find in other areas that there is that, but as I say we have not studied it. I wouldn't want to speculate.

Q. Don't let's speculate. I want you to continue for another couple of years, and let's get to the bottom of this. We are now agreed that if we fixed a minimum price for the distiller that they must not charge us more than anybody else, and if a fair mark-up was made by the State Liquor Authority on that price to the retailer and the consumer, that we could save the consumer the same \$150,000,000. A. I don't think it would ever work as well. You might save him something, but there's nothing like a free market to get prices down to rock bottom.

Q. I don't know how much freer a market you need than the entire 50 states of the Union, and the distiller swears that he's selling to us at as low a price as he's selling anywhere else. A. This would be really a hopelessly unenforceable job. It would mean that the New Yorker is supposed to run around checking prices in 50 states, and the Anti-Trust Division of the Department of Justice can't do that, even with the F. B. I. to help them. I think it would be really a vain effort. I mean the State Liquor

Authority has enough hopeless jobs to do without giving it another one.

Q. Don't let's go into that at the moment because there must be something to this since the distillers are fighting the Kansas law so hard. If there wasn't any teeth in it, they wouldn't mind. The thing that I want you to study further, your Commission—I mean, I ask you, please, to do it—and that is how many intermediate steps are there in this State between the distiller and the retailer, and how many mark-ups are there? And do you need it all—the method of marketing? Who owns the distributors and the wholesalers?

[fol. 52] By Mr. Ambrose:

Q. Mr. Coyne, before I start, may I compliment you on a very delightful statement. It was a great piece of literature. A. Thank you very much.

Q. I would like to ask a couple of questions. Judge Walsh made reference today to a letter from Mr. Lynn, General Counsel of Seagram's in which he made reference to depletion allowances which are, I gather, allowances made by distillers to wholesales subsequent to the sale of the merchandise by the distiller to the wholesaler. In other words, if he's got a large—could you explain this, please, and what effect this may have on the net price paid over the course of a year? A. Well, I can't explain it with any precision. I will give you my impression of what is meant. Now the prices from distillers to wholesalers is constant. Now that does not mean that it does not admit of sales rhythm and imagination in marketing liquor. Now, as I understand it, within certain confines—and they're very small—a supplier will endeavor to establish a bit of excitement in a certain market. And for that purpose he may join in a joint promotion with the wholesaler in that market, and with the result that some depletion allowance, or some credit memorandum will vary the price for an instant to providing the exciting sales rhythm that I mentioned. And that may be seen in different mar-

kets, not at the same time. But the whole sum total of that relationship averages out to a price that is average across the country. And you are aware, of course, that why we resist any legal fixing of distiller's prices, either by reference to another state or to any other measurement. That does not mean that distiller's prices are not constant. Now they are constant for a very good reason. We have, for example, the State of Pennsylvania which is the largest purchaser of liquor in the world. I think they purchase almost \$400,000,000 worth of liquor a year—one customer. They swing a very big bit of leverage, and you [fol. 53] cannot be convinced that that Pennsylvania customer does not insist on the lowest price that the distiller offers anywhere in the country. And it's significant, I think, the price in Pennsylvania is the same f. o. b. price, or virtually the same price, as is offered in New York. So any exercise of imagination by these sales geniuses—and they are sales geniuses—is in such a narrow area that it would even itself off over a period. From the distiller's point of view probably by a temporary response, and from the wholesaler's point of view by concentrating on "my" brand this month, and someone else's brand the next month. But I have examined with great cynicism this idea of my own clients when they tell me that they sell with a constant f. o. b. price, and I've been at it five years. And about midway at that time I became convinced, and I reached the conclusion that I was being the cynic, and strange as it might appear to some segments of the public I found the suppliers on the level. I have dealt with many different business groups in my time, and not only are they more intractable—and if I seemed to be a little bit spirited earlier when I said it was not a rash assumption at some point in our professional existence to assume that another group is on the level—gentlemen, I meant that. And I wish you would take the posture that I took when I took my job, and I examined the bona fides of these people one by one. Now, I'm not going to say that there are not fakers amongst them. But I give you



my word, and I say it's an informed opinion because I've been in law enforcement too, for 23 years, and I think I can spot crooks and fakers as quick as the next one, and I'll tell you—and you have my word for it—that this group subscribe to ethical standards that cannot be matched in any other merchandising group. And I'd be very happy to elucidate on that some time if you have the time.


[fol. 54] Q. In effect, your contention, if I understand you correctly, is that this depletion allowance is used in the same fashion as the post-off or file-off arrangement is used. A. That's as I understand it. I wish I knew more about that. But let me give you what I think is proof. I mentioned the State of Pennsylvania. Now the State of Pennsylvania has a contract which permits them to send accountants into any supplier's office—and they do. They send corps of accountants into supplier's offices to determine whether or not they're getting the best price. And in fact, if they were not they would have a violation of contract which would make each supplier restore to the State of Pennsylvania the difference between that and the constant price that is serviced elsewhere.

Q. Is it possible, or is it probably, or does it come about in any way that you're aware of that the arrangements whereby retailers in the District of Columbia constantly sell liquor at loss-leader levels insofar as it may come about as the result of some malpractices or illegal practices between the wholesaler and the retailer? A. No, I think the wholesaler probably doesn't take the mark-up such as

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[fol. 55]

EXHIBIT D, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY

(See opposite) 

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NEW YORK STATE MORELAND COMMISSION  
ON THE  
ALCOHOLIC BEVERAGE CONTROL LAW

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Study Paper Number 5

Resale Price Maintenance in the Liquor Industry

October 28, 1963



230 Park Avenue  
New York 17, N. Y.

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## RESALE PRICE MAINTENANCE AND THE LIQUOR INDUSTRY

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## PREFACE

The New York State Moreland Commission on the Alcoholic Beverage Control Law commissioned this study in July of this year as one part of a broad examination of the efficacy and desirability of maintaining stringent government supervision and protection of New York's alcoholic beverage industry and the consumers of its products. This segment of the investigation is concerned almost exclusively with the effect of income and price on the demand for distilled spirits. Insofar as the focus here is economic and hence limited, the reader is referred to the Commission papers which treat other facets of alcoholic beverage consumption.

Although this paper carries the name of a single author the counsel of my friends and colleagues is reflected in its pages. I gratefully acknowledge the help received at various stages of this project. Thanks go to Dr. Donald J. Dewey (Columbia University) for his views and comments on the entire manuscript, to Dr. Harvey J. Levin (Hofstra University) for his suggestions on the paper's organization and content, to Mrs. Hyman Lichtenstein for aid with the statistical analysis, to Dr. Richard P. Brief (New York University), and Dr. John E. Ullmann and Dr. Frederic Stuart (both of Hofstra University) for their comments on the correlations, and to Dr. Nathan Goldfarb and Mr. Lowry McKee of Hofstra's Computer Center for their cooperative efforts which made possible the processing of the data by computers. Dr. Mark B. Schupack (Brown University) made constructive suggestions for the strengthening of the analysis.

Mrs. Miriam G. Cedarbaum of the Commission's staff proved to be a friendly critic; her helpful suggestions contributed much to the final stages of the work. The Commission's clerical and professional staff were most efficient and cooperative at all stages of this undertaking.

My wife's editorial advice was particularly welcome as was her patience.

In the last analysis, however, the shortcomings of this work remain the sole responsibility of the author.

HAROLD L. WATTEL  
*Chairman, Division of Business  
Hofstra University*

[fol. 59]

## I. INTRODUCTION

How much control should New York State exercise over the sale of alcoholic beverages within its borders? The question, should New York State retain mandatory resale price maintenance for the marketing of branded alcoholic beverages is just one aspect of the larger question. This background paper approaches this latter question by examining the structure of the alcoholic beverage industry and one aspect of its marketing arrangements—resale price maintenance. The distilling industry is the main focus here. Malt beverages are now sold through grocery stores and are not subject to the more stringent regulations applicable to distilled and fermented alcoholic beverages. Their low alcoholic content places them apart. Wines are subject to the same regulations that affect the sale of distilled spirits, but since they are lower in alcoholic content and price they need not be treated separately here either.

The price controls now in effect on distilled spirits in New York State can be traced to demands for such controls from industry members in the heat of liquor price wars which developed before World War II. The State Liquor Authority described the New York City market in these terms:

"During the last four months of 1940, unstable market conditions prevailed in the Metropolitan New York area. In their eagerness to 'corner' the New York City market, which is reputed to be the largest local market in the country, some distillers reduced prices to the point which, according to reports, was less than the cost to the manufacturer. Secret rebates and 'kick-backs' were granted. Differentials in prices among buyers in the same license class were rampant, and the consumer could purchase liquor from the package store at a price lower than that which the restaurant or tavern keeper was required to pay to the wholesaler."<sup>1</sup>

The Authority blamed the distillers for the unsettled conditions.<sup>2</sup>

The mandatory resale price maintenance<sup>3</sup> solution in New York State seems strange in view of this contention. It handed to the

1. 1940 Report of the New York State Liquor Authority, p. 13.

2. *Ibid.*, pp. 14-15.

3. Distillers must file minimum prices for their branded merchandise and the State Liquor Authority assumes the responsibility for the policing of those prices. Under general resale price maintenance, the producer stipulates minimum prices for his branded merchandise and assumes the burden of policing.



[fol. 60]

distillers, those alleged to have instigated the price wars, the right to fix prices vertically. The main beneficiaries appear to have been the New York State retailers, the main victims, the New York State consumers.

Distiller prices which were originally set high under the cover of the mandatory resale price maintenance statute in New York State have been altered infrequently.<sup>4</sup> Nor have the major distillers seen fit to compete actively with each other by overt price cutting at the retail level.<sup>5</sup> In the face of such price behavior distiller unit profit margins probably have declined.<sup>6</sup> Wholesale and retail distributors meanwhile applied their markup percentages to their invoice costs which included higher taxes, and in this way protected themselves somewhat from the pressures exerted by increasing costs.<sup>7</sup>

The use of the police power of the State to enforce private decisions of manufacturers seems unnecessarily severe medicine for a relatively minor ailment. If New York prices must remain high, the State has ample power to keep them high without delegating price fixing power to private individuals and without committing itself to police their decisions. But must prices remain high?

This paper attempts to review the evidence relevant to this question. We begin with a review of the structure of the distilled spirits industry and the relationships between the trade levels.

4. Harold L. Wattel, *The Whiskey Industry*, unpublished doctoral dissertation available from The New School library, pp. 425-426.
5. Competing brands remain within pennies of each other in the major markets. For example, Seagram's 7 Crown retails for \$4.99, Schenley Reserve for \$4.99, Kinsey Gold for \$5.00, G & W 7 Star for \$4.99, and Bellow's Partners Choice for \$4.99 in New York.
6. The First National City Bank reports that in distilling the profit margin on sales has fallen from a high of 7.2 per cent in 1948 to 3.9 per cent in 1962.
7. Wholesaler and retailer margins have also risen. The retailer paid \$3.20 per fifth for Seagram's 7 Crown in 1950 and sold it for \$4.05, a markup of 26.6 per cent. In 1963 he paid \$3.82 for the fifth and resold it for \$4.99, a markup of 30.6 per cent. In 1950 the markup amounted to \$0.85 and the same markup in 1963 would have given him an absolute amount of \$0.99. However, with the increased percentage markup his absolute amount is increased to \$1.17. In 1950 the wholesaler operated on a markup of less than 15 per cent for this brand; today his markup is more than 20 per cent.

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## II. INDUSTRY STRUCTURE

### A. Concentration in Alcoholic Beverage Manufacturing

The manufacture of alcoholic beverages is one of the more highly concentrated industries in the nation.

TABLE 1

Percent of Value of Shipments and Employment Accounted for by the Largest Companies in Alcoholic Beverage Production, 1958, 1954, and 1947.

SIC Number	Industry	1958 First		1954 First		1947* First	
		4	8	4	8	4	8
		Companies		Companies		Companies	
		(percentages)					
2082	<i>Beer and Ale</i>						
	Value of Shipments	28%	44%	27%	41%	21%	30%
	Employment . . . .	24	39	22	35	19	30
2084	<i>Wines and Brandy</i>						
	Value of Shipments	35	50	38	54	26	42
	Employment . . . .	27	37	23	36	N.A.	N.A.
2085	<i>Distilled Liquor</i>						
	Value of Shipments	60	77	64	79	75	86
	Employment . . . .	57	71	57	73	74	88

\* 1950 for employment.

Sources: *Concentration Ratios in Manufacturing Industry 1958*, Report Prepared by the Bureau of the Census for the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, 87th Congress, 2nd Session, Washington 1962, pp. 12 and 78.

From Table 1 one can see that the beer, ale, wine and brandy industries became increasingly concentrated after 1947 when measured by the value of shipments and employment. In fact, when measured by employment, concentration in these two industries continued after 1954. Concentration in distilling, however, decreased in the two census years since 1947. There are many reasons for this latter development. At the end of World War II the major firms had excellent grain allocations, a good hold on cooperage, and supplies of aged whiskey.<sup>8</sup> With the easing of shortages of these

8. Harold L. Wattel, *op. cit.*, Chapter 3.

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raw materials for bottled liquor production and with brand-taste shifts, the hold of the "big four" distillers (Distillers Corporation-Seagrams, National Distillers, Schenley Industries, and Hiram Walker) on the market was reduced. Distilling, however, remains more concentrated than the other two segments of the alcoholic beverage industry.

The three segments of the alcoholic beverage industry accounted for less than six per cent (5.7 per cent) of the employment in the Food and Kindred Products Industry and less than ten per cent (9.5 per cent) of the value added of the Food and Kindred Products Industry (SIC 20) in 1958.<sup>9</sup> Nevertheless, eight of the companies in alcoholic beverages were among the nation's 500 leading industrial corporations in that year.<sup>10</sup>

Three of the four major distillers, National Distillers & Chemical Corp., Jos. E. Seagram & Sons, Inc. and Schenley Industries, Inc., are among the nation's 500 largest industrial companies, ranking 173, 174, and 268 respectively.<sup>11</sup> The size of the four major firms, however, may be traced to acquisitions before 1951, as Table 2 illustrates:

**TABLE 2**  
**Acquisitions of Companies by the Four Largest Distillers,**  
**1933-1948**

Distiller	Distillery	Nature of Facility		
		Winery (Number)	Cooperage	Other
National Distillers .....	20	1	3	8
Jos. E. Seagram & Sons .....	15	2	1	6
Schenley .....	16	3	2	11
Hiram Walker .....	7	6	2	3

*Source:* Federal Trade Commission, *The Merger Movement, A Summary Report, 1948.*

9. *Concentration Ratios in Manufacturing Industry 1958*, Report prepared by the Bureau of the Census for the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, U. S. Senate, 87th Congress, 2nd Session, Part II, p. 388; and Statistical Abstract of the United States, 1962, pp. 774-5.
10. *Mergers and Superconcentration, Acquisitions of 500 Largest Industrial and 50 Largest Merchandising Firms*, Staff Report of the Select Committee on Small Business, House of Representatives, 87th Congress, November 8, 1962, pp. 46-53.
11. *Ibid.*

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While many of the pre-World War II and immediate post-World War II acquisitions involved facilities intimately related to distillery operations, at least the more recent acquisitions of one company reflect efforts by management to diversify. National Distillers acquired the following firms in the decade 1951-1961: U. S. Industrial Chemicals, Inc., Algonquin Chemical Co., Hegeler Zinc Co., Met-Electro Corp., Panhandle Eastern Pipe Line Co., Kordite Corp., Textron, Inc., Mallory-Sharon Metal Corp., Federal Chemical Co., Inc., Minnesota Liquid Fertilizer Co., Wisconsin Farmco Service Co-operative, Inc. and Bridgeport Brass Co. In fact, the company is now known as National Distillers and Chemical Corporation, a change from the earlier National Distillers Products Corporation.<sup>12</sup>

While there is considerable criticism of concentration ratios based on corporate or industry data rather than product data, such criticism is less valid for the alcoholic beverage industries and for the distilled spirits industry, in particular. Competition in these industries is limited to their own products. While distilled spirits do compete with the lower alcoholic content and lower cost products, e.g., beers and wines, and to a very minor degree, non-alcoholic beverages,<sup>13</sup> the industry agrees that interbrand competition within distilled spirits types and inter-type competition, e.g., gin versus vodka, is the type of competition which concerns the individual company.<sup>14</sup>

### B. *The Economic Effects of Concentration*

When a significant proportion of an industry's employment or shipments is in the hands of a few firms (the four largest firms in distilled spirits were responsible for 60 per cent of the shipments and 57 per cent of the employment in 1958), economists expect that it will have certain characteristics. For example, an economist expects to find the following: 1. It is difficult for new firms to enter that industry either because of natural or manmade barriers. 2. Prices in that industry are likely to be relatively high and stable, especially in comparison to commodities traded on organized exchanges, because a community of interest tends to be recognized. 3. Competition may be intense between the industry leaders but will

12. *Mergers and Superconcentration*, op. cit., p. 126.

13. Harold L. Wattel, op. cit., Chapter 4.

14. *Ibid.*

[fol. 64]

probably be in the form of sales promotion rather than price promotion. 4. Costs may be high in the industry and it may be afflicted with much excess capacity. 5. There will be a great variety of product types in the industry.

This is not an inaccurate picture of the distilled spirits industry, although some of the elements must be qualified.

### 1. Entry

In the matter of entry, there are many barriers in the form of brand names which have consumer acceptance, capital expenditures, working capital for the large promotional expenditures required, and the like. Fifteen years ago, warborn shortages of grain and cooperage would have created difficulties for the new firm; they created problems for the old. Today, these are all in good supply. Aged whiskey is also in good supply, so these can no longer be considered as keeping new firms from the industry. Nevertheless, there has been a steady attrition of plants and firms from the industry, although some of this occurred through mergers. Census data show a decline in the number of companies from 144 in 1947 to 98 in 1954 to 88 in 1958.<sup>15</sup> According to the Alcohol and Tobacco Tax Division, production facilities increased in the pre-war period and declined in the post-war period.

TABLE 3  
Facilities Operated to Produce Beverage Alcohol from  
Grain and Fruit,\* Selected Fiscal Years,  
1934-1962

1934	.....	170
1937	.....	311
1942	.....	282
1947	.....	333
1952	.....	239
1957	.....	188
1962	.....	170

\* Does not include facilities for rectifying distilled spirits.

Source: U. S. Treasury Department, *Alcohol and Tobacco Summary Statistics, Fiscal Year 1962*, Publication 67 (1961), p. 23.

15. 1958 Census of Manufacturers, MC58(2)-20G, Beverages, pp. 4-5.

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There has been no major new firm in the industry since World War II and no major firm has disappeared except through mergers.<sup>16</sup> As noted above, the industry is heavily concentrated, with four firms accounting for 60 per cent of shipments in 1958, and the first 20 firms, 94 per cent.

## 2. Prices

Prices have remained relatively stable except for tax changes in the post-war period. These are summarized next in terms of rates (State: per wine gallon and Federal: per proof gallon).

TABLE 4  
Federal and Average State Tax Rates

Year	Average State Tax Per Fifth of Distilled Spirits*	Federal Tax Per Fifth of 86° Distilled Spirits	Combined Amount	Tax Index 1947=100
1947 .....	\$0.30	\$1.55	\$1.85	100
1948 .....	.31	1.55	1.86	101
1949 .....	.32	1.55	1.87	101
1950 .....	.32	1.55	1.87	101
1951 .....	.31	1.81	2.12	115
1952 .....	.31	1.81	2.12	115
1953 .....	.31	1.81	2.12	115
1954 .....	.31	1.81	2.12	115
1955 .....	.33	1.81	2.14	116
1956 .....	.33	1.81	2.14	116
1957 .....	.33	1.81	2.14	116
1958 .....	.33	1.81	2.14	116
1959 .....	.35	1.81	2.16	117
1960 .....	.35	1.81	2.16	117
1961 .....	.37	1.81	2.18	118
1962 .....	.37	1.81	2.18	118

\* New York State tax has remained at \$1.50 per wine gallon since May 1939.

Source: Distilled Spirits Institute, *Distilled Spirits Annual Statistical Review*, 1962, p. 5.

To place this data in context, it may be pointed out that between 1947 and 1962 the Consumers Price Index rose 35.5 per cent for all items. For food there was a 27.4 per cent increase. According to the data in Table 5, the retail price of whiskey rose some 9.8 per cent since the introduction of the index in 1953.

16. U. S. Treasury, Alcohol and Tobacco Tax Division.



**TABLE 5**  
**Selected Measures of Price Changes, Distilled Spirits Industry,**  
**1947-1962**

1	2	3	4	5	6	7	8	9
Year	Wholesale Price Index Bottld. in Bond 1957-9 =100	Price of Sea- gram 7 Crown to Penn- syl- vania	Retail Price Index Whiskey 1957-9 =100	Index of Price Offerings in Penn- syl- vania 1957-9 =100	Index of Prices of 10 Best Sell- ers, Penn- syl- vania 1957-9 =100	Price of Sea- gram 7 Crown Penn- syl- vania (Retail)	Wholesale Price Index Strts. 1957-9 =100	Wholesale Price Index Spirit Blends 1957-9 =100
1947 ...	125.3	\$29.40	—	83.7	85.7	\$4.01	153.0	93.6
1948 ...	125.3	29.40	—	87.2	86.1	4.03	162.0	93.6
1949 ...	125.3	29.40	—	86.3	83.2	4.03	146.5	93.6
1950 ...	125.3	29.40	—	86.6	86.6	4.03	122.5	93.6
1951 ...	125.3	32.75	—	95.5	96.2	4.46	117.2	93.7
1952 ...	125.3	32.75	—	94.4	97.3	4.46	117.2	94.4
1953 ...	112.8	32.75	94.1	95.5	97.5	4.46	117.2	94.4
1954 ...	101.1	32.75	94.5	96.2	98.0	4.46	104.3	94.4
1955 ...	100.0	32.75	95.1	97.1	98.2	4.46	101.2	94.5
1956 ...	100.0	32.75	96.0	98.4	98.4	4.46	102.0	94.5
1957 ...	100.0	32.95	99.4	99.5	100.4	4.57	102.0	99.7
1958 ...	100.0	32.95	99.6	100.0	99.5	4.57	98.8	100.2
1959 ...	100.0	32.95	100.9	100.4	100.2	4.58	99.3	100.2
1960 ...	100.0	32.95	102.4	103.8	104.2	4.77	99.7	100.2
1961 ...	100.0	32.95	103.0	103.8	104.2	4.74	99.7	100.2
1962 ...	100.0	32.95	103.3	105.1	103.8	4.74	99.7	100.2

Sources: Columns 2, 4, 8, and 9: U. S. Bureau of Labor Statistics

7: Annual Statistical Reports of Pennsylvania  
Liquor Control Board

5 and 6: Calculated by Author from Annual Statistical  
Reports of Pennsylvania Liquor Control  
Board.

3(1947-1956): Estimated by author.

3(1957-1962): Information supplied to Moreland Commission.

Averages, unfortunately, hide many things. After World War II, consumers generally purchased the most readily available whisky, the neutral blend. Distillers had bottled and marketed this product as a way of overcoming the shortage of aged whiskies which had resulted from the production hiatus during World War II. Before that war, neutral blends accounted for less than 40 per cent of the whisky market.<sup>17</sup> By 1946, this figure had increased to 87.9 per

17. Distilled Spirits Institute, *Distilled Spirits Annual Statistical Report*, 1962, p. 27.



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cent.<sup>18</sup> As aged whiskies became available, consumers shifted slowly but steadily away from neutral blends,<sup>19</sup> as the next table shows:

**TABLE 6**  
Spirit Blends Bottled as Per Cent of Total Whisky Bottled,  
1947-1962

Year	Total Whisky Bottled (million Wine gallons)	Spirit Blends Bottled	Spirit Blends as Per Cent of Total
1947 .....	157.3	135.9	86.4%
1952 .....	136.4	92.1	67.5
1957 .....	134.6	69.6	51.7
1962 .....	150.5	73.2	48.6

Source: Distilled Spirits Institute, *Distilled Spirits Annual Statistical Review*, 1962, p. 27.

The shrinking market for neutral blends and relatively stable market for American whisky in general should have lowered the prices of neutral blends. Yet, viewing the leading neutral blend brands of the major distillers for the years 1947 to 1962, it would seem that prices at retail or at the distillery have not reflected this pressure.

**TABLE 7**  
Fifth Prices, Leading Distillers'  
Spirit Blends, Pennsylvania, 1947-1962

	Seagram's 7 Crown	Shenley Reserve	National Bollings Pt. Choice	Hiram Walker GW 7 Star
1947 .....	4.01	4.01	4.27	—
1948 .....	4.03	4.01	4.00	—
1949 .....	4.03	4.02	4.00	—
1950 .....	4.03	4.02	4.00	4.04
1951 .....	4.46	4.45	4.43	4.49
1952 .....	4.46	4.45	4.43	4.48
1953 .....	4.46	4.45	4.43	4.48
1954 .....	4.46	4.45	4.43	4.48
1955 .....	4.46	4.45	4.43	4.48
1956 .....	4.46	4.45	4.43	4.48
1957 .....	4.57	4.56	4.57	4.59
1958 .....	4.57	4.56	4.57	4.59
1959 .....	4.58	4.56	4.57	4.59
1960 .....	4.77	4.75	4.75	4.77
1961 .....	4.74	4.74	4.75	4.77
1962 .....	4.74	4.74	4.75	4.77

Source: Annual Reports of the Pennsylvania Liquor Control Board.

18. *Ibid.*

19. Since the distilled spirits market is in a sense a custom market, data for bottled spirits reflect closely consumer purchases.

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Wholesalers and retailers are willing for the most part to limit price competition to the distillers. They have been in the forefront of the drive in this nation for the enactment of resale price maintenance laws. The Federal Trade Commission grants them a place second only to druggists in this endeavor. Retailers through their associations have threatened boycotts and have engaged in boycotts in an effort to have distillers fair-trade their liquors wherever possible. Once brands are fair-traded, distributors urge distillers to allow larger and larger margins for them.<sup>20</sup>

Some distillers are lukewarm to fair-trade, others support it by word and deed.<sup>21</sup> Seagram, for example, has tended to be one of the staunchest supporters of resale price maintenance. It has issued such pro-fair-trade pamphlets as *Seagram Puts it in Writing* and *Your Stake in Fair Trade* aimed at convincing wholesalers and retailers of the community of interest in resale price maintenance. In each, the company is pledged to a vigorous enforcement program on behalf of its brands.

Before leaving the price issue, it should be noted that the stability that distillers desire and attempt to maintain results also in price matching. The major distillers market a full line of distilled spirits in price "lines."<sup>22</sup> Consumers seldom find any price advantage in choosing one distiller's product over another within the price line.<sup>23</sup> Those outside of the Big Four do maintain a differential in many cases,<sup>24</sup> but they do so to overcome the brand consciousness of the average consumer. Because of the use of holding companies by distillers, consumers seldom know the parent company whose product they select.

Advertising, of course, is employed to enhance a brand's uniqueness, and in this, distiller advertising is not really different from that of any other industry. It also attempts to promote sales, to create consumer loyalty for a brand or distiller, and to create a product image which will result in the consumer's paying a price for the product which will more than reimburse the distiller for the advertising.

20. Federal Trade Commission, *Report on Resale Price Maintenance* (1945), Chapter 8.

21. *Ibid.*

22. *Beverage Media*, August, 1963, passim and *The Liquor Handbook* 1963, pp. 174-210.

23. Harold L. Wattel, *op. cit.*, Chapter 4.

24. *Beverage Media*, August, 1963, passim.

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If it is successful, it presents a barrier to the entry of the new firm which does not have the resources to carry on a major advertising campaign.

### 3. Costs and Capacity

Cost movements are difficult to judge because there is little published information about them. The Census of Manufacturers for 1954 indicates that payroll and material costs constituted about 63 per cent of the value of shipments, and for 1958 indicates a similar percentage. Apparently, the industry was not subject to inflationary cost increases that it was not able to recoup in one way or another. But there have not been important price increases in the industry; one may reason, then, that costs have not risen significantly in the industry. In the period around 1952-1953, a 100° gallon of spirits cost between \$1.00 and \$1.25 to produce; when aged, bottled, promoted, and marketed, the costs of the gallon ran to about \$3.10.<sup>25</sup> Whether these costs were excessive is difficult to say. The industry is composed of a variety of plants; some produce spirits in the most efficient methods possible, others take pride in "old-fashioned" costly methods. During World War II, spirits were purchased by the federal government at prices ranging from \$0.48 to \$1.46 per 190° gallon.<sup>26</sup> Costs of production of three large distillers ran from \$0.69 to \$1.36.<sup>27</sup> It is probably correct to assume as wide a variability in costs of whisky production today. But this is a consumer oriented industry where tastes, custom and status tend to play an important part in shaping prices rather than costs.<sup>28</sup>

Excess capacity is another matter. The industry has been plagued with excess capacity throughout the post-war period, although production has been on the rise in recent years. In 1944 and 1945, the industry produced more than 1.1 billion proof gallons of distilled spirits and whisky; a post-war record was set in 1951 with 846 million proof gallons of spirits and whisky. In fiscal year 1962, only 810 million proof gallons were produced, four per cent below the 1951 peak and 31 per cent below the 1945 post-repeal peak.<sup>29</sup> In 1952, only 522 million gallons were produced, far below the industry's

25. Harold L. Wattel, *op. cit.*, pp. 486-504.

26. *Ibid.*, p. 491.

27. *Ibid.*

28. Harold L. Wattel, *op. cit.*, Chs. 4-6.

29. U. S. Treasury, *Alcohol and Tobacco Summary Statistics, Fiscal Year 1962*, Publication 67 (1962), p. 23.

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potential. Apparently, the industry has been able to live with its excess capacity. Perhaps more troublesome have been inventories. Inventories of distilled spirits at one time had to be tax paid after eight years and represented a threat to the profitability of any firm that had aged whiskies which could not be absorbed by the market. Around 1950 and 1951, these mounted to perilous heights, over one billion gallons; these were drawn down persistently until 1957, when they were permitted to mount again. In 1959, Congress extended the eight year rule to 20. Inventories again stand at the one billion gallon level. The largest portion of the present inventory produced in any one year is attributable to 1960. With the many variables operative, it is not easy to discern the impact of inventories and excess capacity on the industry. It is true, nevertheless, that in the early 1950's, holders of large inventories, Schenley and National, had lower profit margins than usual.

#### 4. Brand Choice

Consumers of distilled spirits are not handicapped by a dearth of choice. Their problem is inadequate preparation for the plethora of products they meet in the market. Not only does each major distiller maintain a full line of distilled spirit types, but each markets products in most of the price lines which exist for those types. In addition, subsidiaries also market a variety of types and brands. The information that follows substantiates this point.

TABLE 8  
Number of Brands of Whisky Types, and Price Ranges,  
Pennsylvania, 1947 and 1962

	1947			1962		
	Number of Brands	Low (fifth prices)	High (fifth prices)	Number of Brands	Low (fifth prices)	High (fifth prices)
Bourbon B. in B. ....	15	\$4.23	\$7.30	19	\$4.50	\$8.70
St. Bourbon .....	13	3.63	6.03	50	3.75	8.99
St. Rye .....	3	3.71	5.93	7	4.00	4.75
St. Corn .....	6	2.90	3.73	1	4.11	4.11
St. Whisky .....	—	—	—	1	4.00	4.00
Whisky .....	—	—	—	5	4.72	7.49
Blend of St. Whisky ...	8	4.18	6.57	4	4.61	5.19
Blended Whisky .....	107	3.00	4.53	59	3.50	5.46
Blended Scotch Type ...	5	2.50	4.68	1	4.55	4.55
Canadian .....	6	5.59	5.99	10	4.78	6.78
Irish .....	4	5.69	7.54	2	6.44	8.09
Scotch .....	42	5.90	8.25	45	5.30	16.61
Young Whisky .....	9	3.00	3.74	—	—	—

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It would be surprising if consumers wended a rational way through this forest of competing types and brands. While "*de gustibus non est disputandum*," it is also probably true that palates are not designed to differentiate between the subtle differences that exist between many of these brands.

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### III. RESALE PRICE MAINTENANCE

Resale price maintenance " \* \* is a system of pricing a trade-marked, branded or otherwise identified product for resale in which, pursuant to laws legalizing such arrangements, the manufacturer, producer or brand owner, or his authorized agent, factor or wholesale distributor, prescribes by contract the minimum price of the resale price at which such product may be sold at wholesale, and the producer or manufacturer and his factors or wholesalers prescribe the minimum price or the resale price at which such a product may be sold at retail, in the specified State, or in a specified portion thereof, with the effect of legally binding all other distributors in the specified area to conform to such prices."<sup>30</sup> In effect, resale price maintenance is a system of vertical price fixing. In the United States, this type of price fixing has been specifically exempted from the Sherman Antitrust Act and the Federal Trade Commission Act by the Miller-Tydings Act of 1937. This enabling amendment permitted the various states to enact resale price maintenance laws sanctioning fair-trade within their borders.

The law and the practices to which it has given rise have been subject to legal controversy since its inception. Landmarks in the legislative-judicial history of resale price maintenance include the *Old Dearborn Distributing Company v. Seagram Distillers Corporation*, 299 U. S. 183 (1936),<sup>31</sup> *Sunbeam Corporation v. Wentling*, 185 F. 2d 903 (1950),<sup>32</sup> *Schwegmann Brothers v. Calvert Distillers Corporation*, 341 U. S. 384 (1951),<sup>33</sup> the McGuire Act, 15 U.S.C. 45 (1952),<sup>34</sup> and *General Electric Co. v. Masters Mailorder Co. of Washington, D. C., Inc.*, 122 F. Supp. 797 (D. C. N. Y., 1957).<sup>35</sup>

The law of resale price maintenance is not easily summarized. As of 1962, 22 states had fair trade laws including provisions for

30. *Report of the Federal Trade Commission on Resale Price Maintenance* (1945), pp. xxvi-xxvii.

31. Sanctioned state enacted resale price maintenance laws.

32. Upheld right of seller within one state to sell below fair-traded price to out-of-state buyers.

33. Invalidated use of "nonsigner" clauses in resale price maintenance contracts. Note: A nonsigner clause when legal binds distributors who have not specifically contracted to observe minimum established prices to do so. The National Wholesale Druggists maintain that the nonsigner clause is the only practical method of enforcing resale price maintenance contracts. The National Wholesale Druggists' Association, *The Basis and Development of Fair Trade*, Third Edition, March, 1955, Foreword.

34. Sanctioned use of nonsigner clauses in resale price maintenance contracts.

35. Permitted a reseller in a non-fair-trade state to sell fair-traded items in fair-trade state at any price.



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the use of the nonsigner clause, 19 states had fair trade laws but the nonsigner clause was not sanctioned, and 8 states either had no fair trade laws or the laws had been declared illegal.<sup>36</sup> There is no federal resale price maintenance law, although there have been repeated attempts to secure such legislation. The most recent attempts have come under the guise of bills purportedly interested in stabilizing product quality.<sup>37</sup>

In 1935, New York enacted a general fair trade law which authorizes brand owners to fix resale prices and bring private law suits against willful violators (General Business Law, Art. 24-a, Laws 1935). This law, popularly known as the Feld-Crawford Act still applies to products other than alcoholic beverages. As to liquor or wine, however, since 1950, section 101-c of the A.B.C. Law has required brand owners to file minimum consumer resale prices with the S.L.A.; and has prohibited package store licensees, on pain of suspension or revocation of their licenses to sell liquor or wine for less than the minimum consumer resale price filed by the brand owner.

The pressure for resale price maintenance laws has come primarily from retail groups, small drug and liquor retailers in particular. This is not to imply that manufacturers are not interested in resale price maintenance. Some are strong advocates of fair-trade while others who are lukewarm support it under pressure applied by distributors. Nevertheless, small retailers are more interested in the high markups sanctioned by resale price maintenance as a basis for profits than are manufacturers who are more disposed to look to larger volume as a source of profits.<sup>38</sup>

Economists have repeatedly and at great length analyzed the effect of resale price maintenance on the economy.<sup>39</sup> All emphasize

36. Committee on Interstate and Foreign Commerce, 88th Congress, 1st Session, *Hearings on HR 3669, April-May, 1963*, p. 81, hereafter referred to as CIFIC, 1963 *Hearings on Quality Stabilization*.

37. *Ibid.* and CIFIC, 87th Congress, 2nd Session, *Hearings on H.J. Res. 636, 637, 639, and H. R. 10335, 10340, 10517, 11227, 11346, and 11778*. The latter will hereafter be referred to as CIFIC, 1962 *Hearings on Quality and Price Stabilization*.

38. *Report of the Federal Trade Commission on Resale Price Maintenance*, (1945), pp. LIV ff.

39. See E. T. Grether, *Price Control Under Fair Trade Legislation* (1939). Recent texts with good discussions include Vernon A. Mund, *Government and Business*, 3rd Edition (1960); and Leonard W. Weiss, *Economics and American Industry*. In addition there have been many articles on the problem. The structure of the next section is suggested by the Mund volume.



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the effects of fair-trade on: 1. the level of prices, 2. protection of brand names, 3. trade practices, 4. productive efficiency, and 5. competition. A summary of arguments for and against resale price maintenance follows. The reader interested in any of these as presented by the participants is referred to the many federal hearings on resale price maintenance and quality stabilization."

### A. Arguments for Fair-Trade

#### 1. Effect on Prices

Resale price maintenance is designed to foster prices which provide adequate margins at all distribution levels and which remain fairly stable through time. Proponents claim that extremely low and extremely high prices disappear with the advent of resale price maintenance. Survey data are submitted which show that specific branded products in particular markets covered by resale price maintenance rose less in the postwar inflation than did those same branded products in open markets; in some instances, advocates report, fair-traded products were actually priced below the same branded products in the open market. Storewide margins under fair-trade are held to be the same or below those stores not operating under resale price maintenance.<sup>41</sup>

40. CIFIC, *Hearings on Fair Trade 1958, Quality and Price Stabilization 1962 and Quality Stabilization 1963*.

41. One of the more complete cases including much of the statistical evidence favorable to the fair-trade case was made by Maurice Mermey, Director of the Bureau for the Advancement of Independent Retailing (formerly the Bureau of Education on Fair Trade). See CIFIC, *Hearings on Quality Stabilization, April-May, 1963*, pp. 144-170. His statistical evidence includes the following studies:

McKesson & Robbins (1939-47) Drugs and toiletries:

Prices increased 24.8 per cent in fair-trade area in period against 41.2 per cent for products in non-fair-trade area. (p. 153)

A. C. Nielson & Co. (1949, 1951, and 1958) Name brand drugs:

"... the weighted average prices in the non-fair-trade area were not lower than those in the fair-trade area..." (p. 154)

Department of Labor (1947-1958) Consumer Price Index:

"... prescriptions and drugs (usually fair traded items wherever possible) increased less than the general price level of other items in the medical care basket." (p. 155)

Ostlund-Vicklund Study (1930's) Drugs:

"... the advent of fair trade in the United States did not increase the retail prices of leading drugstore products." (p. 155)

National Association of Chain Drug Stores (1939-1947) Drugs:

"... fair traded drugstore products held the price line better than non-

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As applied to the sale of liquor, it is specially argued that minimum resale prices discourage excessive consumption. Thus, even if fair trade keeps prices high, its proponents in the liquor industry argue that high prices are a socially beneficial curb on consumption.

## 2. Brand Name Protection

Many of the pricing practices held inimical to small business, according to them, involve the "misuse" of established branded merchandise to attract customers. Producers maintain that when their products are "footballed," that is, subject to "excessive" competitive

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fair-traded drugstore products and very much better than prices generally." (p. 155)

Salt Lake Hardware Co., Salt Lake City, Utah (1942-1960) Hardware:

"... almost 90 percent of such items (hardware) are not fair traded at the wholesale level; yet they show a slightly higher percentage of price increase, 1959 over 1948, than the remaining items which have been fair traded at the wholesale level." (p. 157)

Union Underwear Co., Inc. (1948-1958) Underwear:

Only one price increase in period for list of eight. In list of eight items sold by company there was only one price increase, three price decreases and two prices remained unchanged. Purpose: to show price stability of fair trade items. (p. 158)

Corning Glass Works (1948-1959) Glassware:

This company reported a price increase of 23.8 per cent for a list of 26 items it usually fair-trades. Purpose: to show price stability. (p. 158)

McGraw-Edison Co. (1947-1959) Toasters:

"It is apparent in looking at the pricing trend of the 1B14 toaster that, during the fair trade years of 1949 through 1957, this toaster was slightly increased in price and then reduced—with the result that it is evident the prices of this toaster did not increase while it was fair traded. However, when fair trade was removed in February 1958 the prices on this toaster moved forward—and I believe that this has been typical of the prices on many other competitive electric housewares." (p. 159)

Parker Pen Co. (1949-1958) Fountain Pens:

Price data submitted for period 1949-1958 indicated that for six models of pens there were one increase, three no changes, and two decreases in the period. Purpose: to show price stability. (p. 159)

A critical review of fair-trade price surveys is found in Marvin Frankel's *"The Effect of Fair Trade: Fact and Fiction in the Statistical Findings,"* Journal of Business, July, 1955, pp. 182-194. The Ostlund and Vicklund Study, for example, is one that comes under fire.

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pricing at the retail level, some retailers will give up the line and consumers will lose confidence in the quality of the product.<sup>42</sup>

### 3. Trade Practices

Small independent retailers need protection against unfair practices of larger diversified retailers, it is contended. The latter businesses, it is held, are known to engage in trade practices inimical to the small businessman, such as loss-leader selling, bait advertising, and predatory price cutting. Independent businessmen who attempt to match these practices find, according to their spokesmen, that their markup and profits disappear.<sup>43</sup>

### 4. Effect on Productive Efficiency

Here the proponents' case rests on the stability that arises out of successfully applied fair-trade. The orderliness, in a sense, is defined in terms of maintaining the classic pattern of distribution with adequate markups at all levels of trade so that at least the present business population may not decline. Profit margins, however, would not be set so high as to allow any increase in inefficiency since there would always be pressure from cross product competition to maintain efficiency. Another element in this case is that resale price maintenance laws in maintaining the classic pattern of distribution prevent concentration in distribution.<sup>44</sup>

42. In a letter to the Committee holding hearings on Quality and Price Stabilization in 1962, the vice president of P. H. Hanes Knitting Co. reported on the experience of his company.

"In November of 1947, one of the leading Fifth Avenue stores cut their prices on these garments (sleeping garments for children) to substantially below the nationally advertised price. Other stores in competition with it felt impelled to meet this store's price, and threatened to drop our brand completely. In fact, a number of them did drop our line and replaced it with other brands.

\* \* \*

"Over the intervening years we have gradually won back most of the outlets that had dropped our brand because 'Hanes' was competing with 'Hanes' from store to store. The damage to our brand name had run so deep, however, that two outlets declined to restore our brand into their stores until 1961, 14 years after the uneconomic price war. In the interim consumers could not purchase our excellent values from these stores." (CIFIC, *Hearings on Quality and Price Stabilization*, June 1962, p. 423.)

43. Typical testimony in this regard may be found in CIFIC, *Hearings on Fair Trade*, April-May, 1958, p. 97.
44. The Retail Jewelers of America testified that, "... unless we take steps to give some degree of protection to small individual retailers, we are going to have power of retail distribution so concentrated in this country that we will have effective monopolies such as ... in certain South American countries." CIFIC, *Hearings on Quality and Price Stabilization*, June, 1962, p. 222, and, *Ibid.*, pp. 25 and 110.

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## 5. Impact on Competition

Proponents maintain that competition is not impaired by fair-trade laws. They contend that price competition continues between manufacturers for branded items and further that branded products continue to be price competitive with private label products. The level of prices, it is asserted, has to be sufficiently low to assure general consumer acceptance of branded merchandise.<sup>45</sup>

### B. *The Case Against Resale Price Maintenance*

#### 1. Effect on Prices

Despite the many conflicting surveys through which economists have had to thread their way, they conclude that prices in populous fair-trade areas of branded merchandise are higher than in similar areas outside the reach of resale price maintenance. Most economists agree that oligopoly breeds stable prices. Hence, it may actually be true that prices of fair-traded products have increased less in the post-war inflation than non-fair traded products. It may also be true that prices of fair-traded products in areas with resale price maintenance laws increased less than those same products in areas not covered by such laws. However, increasing prices presumably have a function in a private enterprise economy: they are relied upon to provide growing profits to attract new producers to a field and to encourage producers to expand their output. In this way, the economy adjusts to shortages of goods, and any interference with independent decisions of businessmen which bring about such adjustments has serious social costs.

The interest of retailers and wholesalers in resale price maintenance is not limited to their willingness to help manufacturers maintain a brand-price identity. They have an important interest in the level of prices existing at their trade levels. A large markup provides a profitable operation at a lower volume than would a low markup. Price uniformity throughout a level of trade also tends to freeze the structure of distribution at that trade level. Wholesalers and retailers protest that resale price maintenance does not result in a price level higher than would exist without it. If this were so, their support for resale price is clearly illogical.<sup>46</sup>

45. Representative statements on these points are found in CIFIC, *Hearings on Quality Stabilization*, 1963, p. 168 and 111 and CIFIC, *Hearings on Quality and Price Stabilization*, 1962, p. 18.

46. Vernon Mund, *op. cit.*, p. 421.

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Much evidence has been introduced through the years to show that prices under resale price maintenance are higher and more stable than those without such protection.<sup>47</sup> In the matter of price stability, both sides agree.

## 2. Protection of Brand Names

The nation's laws provide the manufacturer with protection against infringement, or fraudulent use of his trademark. Should the brand owner receive additional protection in the private market? There is no justification for it, say the opponents of resale price maintenance.

It is true that branded merchandise retailed at low profit margins may be discontinued by high profit margin stores. The manufacturer is then faced with a distribution decision. One can hardly argue, they hold, that this is the type of decision he should not face. The quality of the manufacturer's product coupled with its price should be the factors that determine the degree of consumer acceptance he obtains for it.<sup>48</sup>

47. *Federal Trade Commission Report on Resale Price Maintenance*, passim, and CIFIC, *Hearings on Quality and Price Stabilization, June, 1962*, contain a great deal of this type of evidence. In the latter, a study by the Justice Department is found on pp. 234-5. Examples from the drug field are found on pp. 264-70 and in the CIFIC, *Hearings on Quality Stabilization, April-May, 1963*, on pages 211-21.

48. In this context one witness offered the following:

"The majority of manufacturers in the United States are opposed to fixing of prices for brokers, distributors, wholesalers, and retailers. Many of the manufacturers' representatives have indicated that they would prefer not to have to enforce a price for these distributive levels and it has been more or less proven that when fair trade or price fixing by manufacturers was enforceable in 45 States only 10 percent of the Nation's retail sales volume was price fixed. Therefore, by volume, 90 percent of brokers, distributors, wholesalers, and retailers determined their own prices as indicative by economic necessity. Fixing of distributive prices by manufacturers is not necessary for protection of trademarks. Free competitive pricing, not price fixing, creates greater volume.

"In that paragraph we mention Libby, Carnation, Kellogg, Del Monte and many other famous brands which have never been price fixed by the manufacturer in the distributive system.

"The aforementioned famous brands refute other allegations in the quality stabilization bill that manufacturers price fixing is desirable. It is our opinion that these brands compete in esteem with any brands in the marketplace and they have never been protected by any price maintenance." *Ibid.*, pp. 270-1.

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### 3. Unfair Practices

Certain practices are undoubtedly inimical to the profits of other retailers and to other manufacturers. These include sales by manufacturers to retailers at prices which "discriminate" on the basis of geography, of order size, etc. (The term "discriminate" as used here implies the charging of different prices to various buyers for the same goods without a corresponding difference in quality, service, or terms of sale.)<sup>49</sup> Some retail trade practices also are inimical to other retailers and perhaps to manufacturers. These include sales of merchandise at prices which do not cover invoice costs plus minimum operating costs of efficient retailers for the purpose of driving competitors from the market. Another is loss-leader selling whereby a retailer sporadically prices a popular item below invoice costs plus minimum operating costs of efficient retailers for the purpose of expanding his market. This latter type of pricing (loss-leader selling), if it is concentrated consistently on a specific branded item, may cause competing retailers to drop that item and thereby foreclose certain outlets to the manufacturer. Another type of price cutting is the reduction of customary markups at retail. Marketing efficiencies may allow profitable markups which fall below those set by the manufacturer. Sporadic loss leader selling and the use of lower but profitable mark-ups can hardly be classed as "unfair." Since they reflect pricing decisions by those closest to the level of trade for which they apply, they can only be considered healthy for a private enterprise system.

Price cutting which is continuous and results in prices which do not cover invoice and operating costs of efficient retailers may be considered "unfair." The question remains whether it is desirable to grant to manufacturers, who are private individuals, the legislative right to conspire to fix prices vertically. There are remedies which are less sweeping and oppressive.

"Bait" and misleading advertising are retail practices usually cited as justifying resale price maintenance laws. These, too, may harm retailers and manufacturers, but, say opponents of fair-trade, they should and can be dealt with through other types of legislation and administrative arrangements, such as prohibition of sale below cost.

The independent retailer should not be deprived of his right to determine his own margins and prices. It should also be remembered

49. Vernon Mund, *op. cit.*, p. 138.



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that resale price maintenance laws, especially mandatory laws, usually bring with them increased governmental activity in the private market.<sup>50</sup>

#### 4. Productive Efficiency

Proponents of resale price maintenance tend to focus on two sets of businesses: producers with high priced branded merchandise and small retailers. Their case ignores the possibility that the manufacturer may not know the best markup policies for all levels of trade; further, they ignore a basic tenet of the American private enterprise system, namely, that profits are to be a reward for innovational efficiency. Some retailers are more efficient than others; the more efficient may wish to pass along cost savings to their customers and consequently enlarge their markets. Under resale price maintenance, they cannot do so. Inefficient and high cost distributors are permitted to stay in business. This results in a poor allocation of resources within the economy and shifts income from consumers to businessmen who do not merit it.<sup>51</sup>

#### 5. Maintenance of Competition

Opponents of resale price maintenance say that it reduces the number of pricing decisions in the economy by allowing the manufacturer to establish prices vertically through all levels of trade and, in a very real sense, horizontally through the distribution levels. Wholesalers and retailers of price-fixed merchandise, then, cannot compete with one another on the basis of price.

To those skeptics who reply that if price competition is desired, it remains at the manufacturing level, producer versus producer, the answer must be that, unfortunately, too many of America's manufacturing industries are oligopolies, that is, dominated by a few firms responsible for the bulk of the output and employment in the industry. Those firms recognizing a community of interest tend to avoid price competition in favor of nonprice competition. The end result is price stability at some high level which does not reflect the varying efficiencies of businessmen.<sup>52</sup>

50. See, CIFIC, *Hearings on Quality and Price Stabilization, June, 1962*, pp. 232-3 for an example of testimony on these points.

51. See, CIFIC, *Hearings on Quality and Price Stabilization, June, 1962*, pp. 382-3.

52. CIFIC, *Hearings on Quality Stabilization, April-May, 1963*, p. 209 for representative testimony on these points.



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### C. *Conclusions About General Resale Price Maintenance*

Many economists recommend that resale price legislation be repealed. They are joined in this conclusion by the Report of the Attorney General's National Committee to Study the Antitrust Laws<sup>53</sup> and British Board of Trade.<sup>54</sup>

These conclusions rest on evidence which suggests that resale price maintenance leads to generally higher prices, a dampening of retail and wholesale efficiency, excessive distribution capacity, a high level of costly competitive devices, a costly system of price policing, an increase in the importance of private label merchandise, and lower levels of output and employment than are possible without it.

The next section of this paper considers the effect of resale price maintenance in the liquor industry.

53. *Report of the Attorney General's National Committee to Study the Antitrust Laws*, March 31, 1955, p. 154.

54. British Board of Trade, *Report of the Committee on Resale Price Maintenance*, June, 1949 (Cmd. 7696), pp. 33-4 and its *A Statement on Resale Price Maintenance*, June, 1951 (Cmd. 8274), p. 11.

## IV. FREE VERSUS FAIR-TRADE IN DISTILLED SPIRITS

Resale price maintenance works best for products which are highly advertised, nonperishable, widely distributed, relatively low priced, and not highly stylized or seasonal.<sup>55</sup> The effectiveness of fair-trade is enhanced when " . . . manufacturers of brands which are close substitutes collectively desire to maintain resale prices and . . . organized retailers of the few leading brands, which account for most of the business, cooperate in establishing and policing resale price arrangements."<sup>56</sup> Distilled spirits and the distilled spirits industry respectively, seem to meet these tests.

Distilled spirits are highly advertised. Distillers spent more than \$100 million for advertising in the major media in 1962, approximately one half of the total for all alcoholic beverages.<sup>57</sup> This sum represented 1.72 per cent of consumer expenditures for distilled spirits or some 40 cents per gallon of distilled spirits consumed.<sup>58</sup>

Distilled spirits are nonperishable. When bottled, distilled spirits will last indefinitely. When aging in barrels the quality is subject to change but the consumer is accustomed to equating the aged product with quality.<sup>59</sup> On the other hand, the distiller is not permitted to age his products beyond 20 years without payment of the federal tax. The distiller is faced also with the problem of evaporation during aging. At the moment the last two factors are not considered troublesome by the industry.

The "fifth" of distilled spirits can be considered relatively low priced and hence a prime subject for resale price maintenance. A "case" sale, of course, represents an outlay of some \$50 or more and may be subject to "discounting." Voluntary<sup>60</sup> resale price maintenance tends to break down faster than mandatory<sup>61</sup> resale price

55. Vernon Mund, *op. cit.*, p. 411.

56. *Ibid.*, p. 412.

57. *The Liquor Handbook*, 1962, pp. 174-210.

58. Calculated by author.

59. The relationship between aging and "quality" of whisky is not well established. At least one major distiller has gone on record that American whisky deteriorates in quality after four to six years in the barrel. For a lengthier discussion see Harold L. Wattel, *The Whisky Industry*, unpublished doctoral dissertation, New School, pp. 20-26, 35-36, and 202-343.

60. Minimum prices established by manufacturer for all trade levels and policed by him.

61. Minimum prices established by manufacturer for all trade levels but policed by the State.

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maintenance; nevertheless there is price shading even under the latter scheme.<sup>62</sup>

There are seasonal variations in the consumption of distilled spirits by types but bottled spirits held from one season to the next would not affect consumer choice even if he were able to detect this.

Many distillers allege that they are strong supporters of resale price maintenance for their products and wholesale and retail liquor dealers are on record in support of this type of price control for the products they sell. Since price cutting under resale price maintenance does occur it means that some businessmen at one or all of the trade levels seek a market advantage by deviating from the suggested prices of the distiller. To the extent that some states are willing to cooperate with the industry to police the minimum prices, the efficacy of resale price maintenance is enhanced. In few fields outside of liquor does one find this type of industry-government cooperation to maintain prices.<sup>63</sup> It is not by chance that many of the significant judicial decisions on resale price maintenance have resulted from litigation involving distillers.<sup>64</sup> In 1945, the Federal Trade Commission concluded that, "While the operation of Federal and State fair-trade laws has not proved as successful in the liquor business as had been hoped by its proponents, they have undoubtedly, had considerable restraining influence on price competition within the liquor industry."<sup>65</sup>

New York State has had mandatory resale price maintenance for liquors since April 15, 1950. Under it, brand owners must list minimum prices with the State Liquor Authority which the latter polices. Manufacturers, wholesalers, and retailers pay a fee to defray the expenses of administering the regulation. Violators are subject to penalties ranging from license suspension to license revocation.<sup>66</sup> See Table 9 for a record of the fees collected and penalties meted out since the law's inception.

62. See Table 9 for a list of violations of minimum resale provisions of New York State law.

63. There are analogous situations in farm products.

64. See, e.g., *Old Dearborn Distributing Co. v. Seagram-Distillers Corporation*, 299 U. S. 183 (1936), *Schwegmann Bros., et al. v. Calvert Distillers Corporation*, 341 U. S. 384 (1951), and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1949).

65. *Report of the Federal Trade Commission on Resale Price Maintenance* (1945), p. 406.

66. Laws of New York, Chapter 689, Section 101-C.

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TABLE 9

Fees Collected, Price Schedule Posting\* and Minimum Consumer Resale Price Posting\*\* and Penalties Imposed for Violations of Minimum Resale Price Regulations,† New York State, 1950-1961

Year	Price Schedule Listing Fees		Minimum Consumer Retail Price Listing Fees		Violations of Minimum Consumer Regulations for which Licenses were Revoked, Cancelled or Suspended	
	Number	Amount	Number	Amount	Notice of Violation Only	
1950	.... 365	\$74,600	6,995	\$89,450	4	147
1951	.... 348	72,250	5,253	67,990	31	314
1952	.... 336	70,250	5,246	67,400	9	244
1953	.... 323	69,250	5,212	66,530	10	190
1954	.... 330	70,300	5,256	67,270	12	139
1955	.... 305	65,950	5,190	65,540	14	94
1956	.... 300	65,550	5,204	65,860	11	68
1957	.... 305	67,700	5,118	64,870	15	34
1958	.... 290	66,250	5,172	64,790	15	29
1959	.... 291	67,550	5,183	64,450	30	32
1960	.... 275	65,350	5,100	63,440	13	32
1961	.... 277	65,450	5,118	63,700	19	11

\* To be filed by manufacturers and wholesalers pursuant to section 101-b of the Alcoholic Beverage Control Law. The stated purpose of the section is to promote temperance by eliminating price discrimination.

\*\* To be filed by manufacturers and wholesalers pursuant to section 101-c of the Alcoholic Beverage Control Law. The stated purpose of the section is to promote temperance by eliminating price wars.

† Schedule of penalties for violation of minimum price regulations is found in section 101-c part 7 as follows:

First offense—not exceeding ten days suspension of license.

Second offense—not exceeding thirty days suspension of license.

Third offense—license may be suspended, cancelled or revoked.

In addition the penal sum of the bond filed by the licensee may be recovered by the Authority.

Source: Annual Reports of New York State Liquor Authority

At the present time the majority of liquor markets are subject to compulsory resale price maintenance. Of the 33 "license" subdivisions of the nation, 17 have compulsory resale price maintenance, while five have no fair-trade for liquors at all. Table 10 contains the information by state.

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TABLE 10

## Liquor Price Control Arrangements, License States, October, 1963

<u>Compulsory Resale Price Maintenance</u>	<u>Voluntary Fair Trade With Non Signer Clause</u>	<u>Voluntary Fair Trade Without Non Signer Clause</u>	<u>No Fair Trade</u>
Alaska	Arizona	Colorado	District of Columbia
Arkansas	Illinois	Florida	Kansas
California	Nevada	Louisiana	Missouri
Connecticut	North Dakota	South Carolina	Nebraska
Delaware	South Dakota		Texas
Georgia	Wisconsin		
Hawaii	Wyoming		
Indiana			
Kentucky			
Maryland			
Massachusetts			
Minnesota			
New Jersey			
New Mexico			
New York			
Rhode Island			
Tennessee			

Source: Staff of New York State Moreland Commission.

New York State has mandatory resale price maintenance. The policing of prices under resale price maintenance laws and the penalties which may be imposed are important aspects of these laws. When a manufacturer must police prices himself, he may have to engage a detective agency to gather evidence for litigation. If he wins his case, he may find that he is still unable to prevent the flow of his products to price offenders. If he secures an injunction, of course, the retailer is likely to comply with the court order.

When the state polices the pricing situation and is willing to revoke licenses of offending parties as in New York State, the manufacturer is almost guaranteed a "costless" type of price control. Private policing is a very costly enterprise." The more than \$120,000 New York State now collects for price listing fees is not inconsiderable. Further, the police power of the State is a deterrent in itself.

67. "Prior to February, 1958 when General Electric abandoned price-fixing fair trade the company proposed 3,000 alleged price-fixing violations in 5 years at a cost of a million dollars." CIFIC, *Hearings on Quality and price Stabilization*, June, 1962, p. 273.

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Let us turn now to the effect of resale price maintenance on the liquor industry. The effect on the business population, competition, trade practices, brand names, and prices will be treated in that order.

### A. *The Changing Business Population*

A word about the business population in the distilled spirits industry is in order. First, the number of distillers in the nation decreased from 144 in 1947 to 88 by 1958.<sup>68</sup> A further reduction is suggested by the decline in production facilities operated between 1958 and 1962.<sup>69</sup>

The data for the number of wholesalers and retailers show conflicting trends with a decrease in the number of the former and increases in the number of the latter as Table 11 shows.

TABLE 11

Wholesale and Retail Establishments, United States, New York State and the District of Columbia, 1948 and 1958

	All Wholesalers		Off-Premise Retailers	
	1948	1958	1948	1958
United States .....	1,766*	1,739††	33,422	37,068
New York State .....	280**	200	4,391†††	4,151†††
District of Columbia .....	24†	15	334	356

\* Includes wholesalers in control states and 101 manufacturers' sales offices who also carried beer.

\*\* Includes 85 wholesalers who also carried beer.

† Includes 7 wholesalers who also carried beer.

†† Includes wholesalers in control states.

††† These data differ slightly from those of the New York State Liquor Authority. The retailer population has remained virtually stable as a result of the license moratorium.

Sources: U. S. Census of Business, 1948, *Wholesale Trade*, Vol. IV, passim.

U. S. Census of Business, 1958, *Wholesale Trade*, Vol. IV, passim.

U. S. Census of Business, 1948, *Retail Trade*, Vol. III, passim.

U. S. Census of Business, 1958, *Retail Trade*, Vol. I, passim.

Off-premise liquor retailers in the United States, New York State, and the District of Columbia had total sales of \$4,202.0 million,

68. 1958 *Census of Manufactures, Beverages*, MC58 (2)-20G, pp. 4-5.

69. From 1958 to 1962 the changes have been as follows: 193, 186, 178, 165, and 170. *Alcohol and Tobacco Summary Statistics, Fiscal Year 1962*, p. 23.



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\$451.4 million, and \$97.7 million<sup>70</sup> and average sales of \$113.4 thousand, \$108.8 thousand, and \$274.3 thousand respectively in 1958. Average sales in New York State were below the national average and less than one half those of the District of Columbia retailer.

These findings suggest that the markup is higher in the New York store than the District of Columbia store. Evidence presented later also supports this, and this is in line with earlier findings which showed that package liquor stores in states with mandatory resale price maintenance had not only higher profits but higher costs, as well. These data are found in Table 12.

TABLE 12

Gross Margins, Total Expense, and Net Profit of Liquor Stores, 1950

	(Percentages)		
	Gross Margin	Total Expense	Net Profit
83 stores in states with state enforced liquor resale price maintenance .....	22.1%	18.2%	3.9%
34 stores in states with voluntary state enforced liquor resale price maintenance	20.5	17.7	2.8
68 stores with state general resale price maintenance law only .....	18.8	15.8	3.0
37 stores with no liquor price control or state Fair-Trade law .....	16.0	14.6	1.4

Source: Robert L. Tebeau, "Package Liquor Stores Operating Results in 1950," *Cost of Doing Business Survey Number 5*, Dun & Bradstreet, Inc.

Apparently, the more stringent the law and the better policed it is, the higher the accounting items—expenses, gross margins, and net profits—tend to be.

## B. Competition, Trade Practices, and Branded Distilled Spirits

The influence of resale price maintenance on the character of competition in liquors is best shown by comparing the District of Columbia market which has no fair-trade in liquors with the New York market that does.

### 1. The Consumer

The consumer of packaged liquor in New York State seldom sees retailer advertising which offers price reductions on name brands

70. 1958 *Census of Business, Retail Trade, Vol. II, Pt. 1*, pp. 1-6 and 9-5 and *Vol. II, Pt. 2*, pp. 32-5.



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of distilled spirits. He does, however, meet advertised prices and price reductions on private label products. In Washington, D. C., he meets both. A more intensive analysis of prices in the two markets is found in section 5 to follow.

The consumer may not bargain and obtain legal price reductions on quantity purchases of branded liquors although he may do so on unbranded products in New York State. In Washington, D. C., the consumer may bargain and obtain legal price reductions on quantity purchases of both branded and unbranded products. There are, of course, provisions for minor price reductions on branded liquors in the minimum prices stipulated by distillers in New York State.

Other sales promotion devices such as the issuance of stamps with purchases, the giving of novelties with purchases, and general advertising are limited in both markets.

## 2. The Retailer

The New York State retailer does not have the freedom to set his retail prices for branded liquors as does his Washington, D. C. counterpart. He may not even have complete freedom to set his price for his private label merchandise.<sup>71</sup> However, he is subject to price inducements on the part of the wholesaler and distiller to push particular brands of distilled spirits. The retailer with ample resources is able to inventory branded spirits in months of price cuts for sale at any time during the year. This device, cutting prices to the retailer without commensurate cuts to the consumer, has been growing in New York. For example, in August, 1950, there were four price reductions for 120 brands of blended (with neutral spirits) whiskies. In August, 1963, 23 of the 111 brands of blended whiskies scheduled price reductions. The effect of these reductions is to increase the retailers' margins.

The absolute and relative margins for a bottle of distilled spirits are then important pricing devices for stimulating *brand* sales but not total sales in New York State since the consumer usually does not see the price cut. In August, 1950, the bottler of *Baltimore Club*, a blended whiskey, advertised that it "Champions a 40% mark-up for you, Mr. Retailer"<sup>72</sup> at a time when the retailer was obtaining some 25 percent to 27 percent on his leading brands of whiskey.

71. *Report of the Federal Trade Commission on Resale Price Maintenance*, (1945), p. 347.

72. *Beverage Media*, August, 1950, p. 5.

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Retailers have not obtained 40 percent mark-up they sought<sup>73</sup> but since the increase in the federal distilled spirits excise in 1951 they have increased their absolute and relative mark-ups even on leading brands. They now obtain approximately a 30 percent mark-up on their leading brands against approximately 27 percent in 1951.<sup>74</sup>

The retailer in Washington, D. C. presumably gets along on a smaller mark-up. The large volume store operates with a mark-up of approximately ten percent and the small volume store with something close to 20 percent.<sup>75</sup> Since price data are not published for the various trade levels these arrangements cannot be ascertained with great certainty. It is clear, however, that price competition at the retail level does filter back to the wholesaler and possibly the distiller. Or, and this is equally plausible, distillers may underwrite retail price competition.

For example, many retail prices in the District of Columbia are below the cost to New York State retailers.

TABLE 13

Retail Prices of Selected Distilled Spirits Brands, Washington, D. C.,  
Compared With Wholesale Prices of the Same Brands,  
New York State, September, 1963

Brand	(Fifths)	
	Washington, D. C. Retail Price	New York State Wholesale Price
P. M. (Blend) .....	\$2.85	\$3.45
Old Crow (Straight) .....	3.39	4.15
Gilbey's Gin .....	2.87	3.17
Haig and Haig (Scotch) .....	4.59	5.31
Seagram's V. O. (Canadian) ....	4.87	5.06

Sources: *Beverage Media*, August, 1963; *Washington Post*, September 4, 1963, and field survey by author.

Profitability, of course, is a function of margins, efficiency, and volume. Above it was noted that the Washington retailer had a

73. *Beverage Media*, August, 1950, p. 45. Headline of story reads: "Priority of Supply and 40% Mark-Up for New York Licensees Assured."

74. An example may suffice here. A fifth of Schenley Reserve cost the retailer \$3.19 in September, 1951, and he retailed it for \$4.05, a mark-up of 27.0 percent. In August, 1963, he paid \$3.82 and sold it for \$4.99, a mark-up of 30.6 percent.

75. From recent conversations with retailers and officials in Washington, D. C.

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greater volume of sales than the New York retailer. The New York retailer, however, enjoys a higher mark-up than the Washington, D.C. retailer. Even before World War II volume dealers maintained that retailers could operate profitably on an 18 percent margin when the industry and trade associations were claiming that retailers needed between 30 percent and 40 percent.<sup>76</sup> If there were lower margins in New York State, it might have fewer package liquor stores. One publication maintains that the field (retailing of liquors nationally) remains overpopulated.<sup>77</sup>

### 3. The Wholesaler

The number of liquor wholesalers has been declining and this has been hailed by the trade. It is alleged that more than 90 percent of the business is now handled by fewer than 1,000 wholesalers.<sup>78</sup> Once the wholesaler was the weakest of the three trade levels; he has now increased his power. This is reflected in what has happened to his margins in New York State market. In August, 1950, wholesalers had markups of approximately 13 percent and 13 years later, approximately 23 percent.<sup>79</sup>

Wholesalers in New York do not have the freedom to set prices for branded spirits while those in Washington, D. C. theoretically do. The term "theoretically" is used since distilled spirits in Washington, D. C. are marketed by monopoly wholesalers, that is, brands are wholesaled by one firm and only one firm. This system is criticized by retailers as limiting the degree of competition. In this context then, wholesalers probably are akin to controlled houses. The ability of the distiller to disfranchise a wholesaler leaves the former with the power in the market.

Since the price at which wholesalers may sell their branded products in New York are set by the distiller, price inducements to retailers to favor one brand over another, as noted earlier, are the result of distiller decisions in New York. Yet, wholesaler interests

76. *Federal Trade Commission Report on Resale Price Maintenance* (1945) p. 359.

77. *The Liquor Handbook*, 1960, p. 56.

78. *The Liquor Handbook*, 1962, p. 68.

79. Seagram's 7 Crown, for example, cost the New York wholesaler approximately \$33.75 in August, 1950, and he sold it for \$38.05, a mark-up of 12.8 percent; in August, 1963, the figures were \$36.60 and \$45.19 respectively, a mark-up of 23.5 percent.

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may be jeopardized by local market conditions, e.g., private label merchandise may make inroads on his volume, and he does not have the price control with which to fight.

#### 4. The Private Label

According to the trade press the private label liquor is a growing factor in the market.<sup>80</sup> This development could have been predicted. The private brand has emerged in other industries where resale price maintenance has attempted to protect distribution margins. Private label merchandise is often produced by the manufacturers of branded merchandise. And this is true in liquors.<sup>81</sup> It offers the retailer a chance to develop a brand loyalty to a quality product that carries neither the heavy promotional expense nor large distribution margins.

Distillers are alleged to be concerned about "... the growing private-label problem" and "... high volume wholesalers who stimulate the demand for 'private labels'." Wholesalers argue that "... there is a genuine, largely non-competitive demand for low-priced private labels among low-income consumers, and cite their indisputable cost problem as justification for exploiting every market opportunity."<sup>82</sup>

Some retailers, department stores and independent dealers in New York City, have a substantial portion of their business in private label liquors.<sup>83</sup>

How the distillers intend to deal with the threat of private label merchandise is not clear although many tactics are possible. For example, they have successfully sought additional fees for private label liquors in New York State,<sup>84</sup> they have applied pressures on

80. Beverage Media, August, 1963, p. 15 and *The Liquor Handbook 1963*, p. 69.

81. *Report of the Federal Trade Commission on Resale Price Maintenance*, (1945), p. 345.

82. *The Liquor Handbook*, 1963, p. 69. The August 1963 issue of Beverage Media reported that the president of Joseph E. Seagram & Sons warned that "... brand-name manufacturers who produce their merchandise under private labels are committing economic 'suicide' as well as undermining American industry" (p. 21), and at the same time the vice-president of Esbeco Distilling Corporation, a producer of private label liquors, "... complained to the anti-trust division of the Department of Justice that several unnamed distillers are attempting to destroy the private label business" (p. 85).

83. E.g., R. H. Macy and Nussbaum (61 Cortlandt St.).

84. Rule 107-a of the Alcoholic Beverage Control Law, as amended by ch. 204, Laws of 1963. A registration fee of \$100 for each brand of liquor is now required. This fee is paid by the brand owner.

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small producers of private label merchandise,<sup>88</sup> they have carried on a public relations campaign against private labels,<sup>89</sup> and they are now using price tactics.<sup>87</sup>

The turn to overt price cutting perhaps reflects intensified "wheeling and dealing" that has always plagued liquor markets.<sup>90</sup> The editors of *The Liquor Handbook* took note of this fact when they wrote that

"The typical open state has all the virtues and ills of private enterprise: opportunities for the 'little man' to 'make good' \* \* \* the chance to make a success of a little-known brand, but the temptation to do so by cutting prices drastically, 'wheeling and dealing' and creating market disorder."<sup>91</sup>

Private brands tend to hold larger portions of the volume markets under resale price maintenance than they do when fair-trade is not operative. One further point is worth noting. Retailers of private label merchandise in Washington, D. C. do not rely on the price cutting of branded merchandise to attract customers. *Milstone's Acme Liquor* advertises private labels exclusively as does *Central Liquor*.<sup>90</sup> Other stores, *Larimer's* and *Sir*, noted for their low liquor prices, do feature national brands in their advertisements.<sup>91</sup>

Let us now turn to the matter of price differentials between markets with resale price maintenance and those without.

## 5. Price Differentials

The battle of the surveys between proponents and opponents of resale price maintenance is not totally inconclusive. This author concluded some ten years ago that "In areas where mandatory resale price maintenance is in effect, whisky prices are higher, more uniform, and more stable than prices in areas having no resale price

85. *Beverage Media*, August, 1963, p. 85.

86. *Ibid.*, p. 21.

87. *Ibid.*, p. 15.

88. *The Liquor Handbook*, 1958, p. 35; *The Liquor Handbook*, 1963, p. 66.

89. *Ibid.*, p. 70.

90. *Washington Post*, September 4, 1963.

91. *Ibid.*

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maintenance."<sup>92</sup> Other scholars have reached substantially the same conclusions.<sup>93</sup>

There is little published on effective prices in non fair-trade areas. Some of what is published is suspect. For example, *The Liquor Handbook* publishes retail sales prices of leading brands in its annual issue but these are obtained from the distillers who have an interest in minimizing the degree of price competition.

The price of \$4.57 for *Seagram's 7 Crown* in the Washington market is some sixty cents too high. In general, Washington, D. C. prices are known to be about one dollar or more below New York State prices. New York State and the District of Columbia have

TABLE 14

Retail Prices of the Nation's Leading Twenty Brands of Distilled Spirits,  
New York State and Washington, D. C.  
August — September, 1963

Brand	Prices Per Fifth	
	Washington, D. C.*	New York State†
Seagram 7 Crown .....	\$3.49	\$4.99
Seagram's V.O. ....	4.99	6.65
Canadian Club .....	4.99	6.55
Old Crow .....	3.39	5.45
Imperial .....	3.18	4.50
Jim Beam .....	3.49	5.10
Calvert Reserve .....	3.49	Calvert Extra 4.99
Schenley Reserve .....	3.49	
Early Times .....	3.79	5.45
Ancient Age .....	3.59	5.95
Corby's Reserve .....	2.99	4.49
Fleischmann Preferred .....	3.18	4.55
Ten High .....	2.99-3.18	not marketed
Old Taylor .....	4.29	5.95
Cutty Sark .....	5.59	7.11
Four Roses .....	3.69	5.10
Kessler .....	not marketed	not marketed
J & B .....	5.95	7.09
Old Sunnybrook .....	3.29	not marketed
Kentucky Gentlemen .....	3.19-3.39	4.79

Sources:

\* Information supplied to the Moreland Commission by industry member.

† *Beverage Media*, August, 1963, pp. 2-B1 to 10-B1.

92. Harold L. Wattel, *op. cit.*, p. 600.

93. See Charles F. Stewart, *Mandatory Resale Price Maintenance of Distilled Spirits in California*, *Journal of Marketing*, April, 1954, and Charles H. Hession, *The Economics of Mandatory Fair Trade*, *Journal of Marketing*, April, 1950.



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similar excise taxes—\$1.50 per wine gallon in addition to the \$.20 per fifth use fee which New York imposed in 1963.

What may not be generally recognized is that private label spirits tend to be lower in Washington, D. C. than those in New York State. Of course, inter-label comparisons are difficult since an equation of quality is almost impossible. A sampling of private label spirit blend prices in New York State reveals that a fifth may be had as low as \$3.69; there may be lower prices. In the District a quart may be purchased for \$3.39 and many national brands sell for as low as \$2.85 a fifth. Bonded bourbons in New York start as low as \$4.79 but in Washington as low as \$3.19. Straight bourbons may be purchased in New York for as little as \$4.59 per fifth but in Washington they could be had for as low as \$2.77. A low price for private label scotch in New York is \$4.59, while in Washington scotch sells for as low as \$3.59. But since the avowed purpose of resale price maintenance in New York State has been to prevent price competition in liquors, it is not surprising to find prices in New York State higher than those of Washington, D. C. In fact, according to *The Liquor Handbook*, they are among the highest in the nation.<sup>94</sup>

There is strong evidence in the table of prices found in *The Liquor Handbook*, 1963 (p. 67) that prices for distilled spirits are higher in fair-trade states than in non-fair trade states. But the industry is not likely to argue the point; one of the values of fair-trade, say its advocates, is that the absence of price wars and the presence of higher prices discourage irresponsible consumption.<sup>95</sup>

Despite the relatively high price level for distilled spirits in New York State, price conscious consumers may elect to pay less for their liquor if they are willing to accept the private label and

94. *The Liquor Handbook*, 1963, p. 67.

95. The former president of Joseph E. Seagram & Sons, Inc. said,

"... farseeing members of our industry including a number of State Liquor Authority officials, have sought to implement general fair trade regulations with laws designed to use fair trade as a social welfare instrument which would prevent recurrence of such previous evils as indiscriminate price wars which tore down the fiber and substance of State control. . . .

"I believe we can all testify to its efficacy (effective fair-trade) in providing for the orderly distribution of alcoholic beverages and in fostering temperance and promoting social control."

*Seagram Puts it in Writing*, p. 2 (pamphlet, no date).



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non-national brands. This is not to imply that the major distillers do not attempt to provide for him. There are price lines for distilled spirits as for many other products. Table 15 lists these price lines for spirit blend whiskies, representative brands, and the portions of the market they command.

**TABLE 15**  
**Price Classes for Neutral Blend Whiskey,**  
**New York State, 1963**

Class	Price Range of "fifths" (New York Prices)	Distribution of National Representative Brands Purchases, 1962	Representative Brands
C .....	Under \$4.01	7.5%	Mr. Boston Pinch
B .....	\$4.01- 4.50	47.0	Corby's Reserve
A .....	4.51- 5.15	44.3	Seagram's 7 Crown
A Prime .....	5.16- 6.40	1.2	Four Roses

*Source: The Liquor Handbook, 1963, p. 68.*

Some choice does exist within the above price structure, but it is not only the range of prices which is of concern here, but the level also.

The price conscious consumer who is limited to purchasing his distilled spirits in New York State may save from fifty to seventy-five cents per fifth on his purchases by seeking out the palatable private label. If he is able to secure his liquor in Washington, D. C. (a form of bootlegging), he is able to save approximately one dollar per fifth not only on nationally branded merchandise but on private label spirits as well.

There are those who maintain that quality spirits may be secured only at a high price or that high price is always associated with high quality. They are probably unaware of the many factors which account for the price of distilled spirits. These factors include the quality of the ingredients, the alcohol content of the spirits, the age of the product, the skill of manufacture, the efficiency of production, the price policy of the distiller, the status consideration of the consumer, federal and state taxes, and the margins of the distributors.

Resale price maintenance is a key factor in determining the margins of distributors. A study of consumer purchases of spirits

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suggests that the average consumer is far from knowledgeable about spirits and cannot determine the price differences occasioned by "quality" differences. Little low priced whiskey is sold. Does this mean that the average consumer is an irrational consumer? The only element in his favor is to grant to him the possibility that he may minimize his chances of purchasing an "inferior" product by staying within the middle price lines of nationally advertised brands. If he is committed to this pattern of behavior, should he not at least be protected by price competition?

In 1945, the Federal Trade Commission found that resale price maintenance in the distilled spirits industry was aimed at the elimination of dealer price competition, the elimination of price quotations in advertising, the elimination of secret price reductions, and the development of higher gross margins. These goals seem to have been achieved in New York State. No market, however, is completely stable. Efforts to achieve these goals are to some extent thwarted by the ubiquitous undercover "wheeling and dealing", and the growth of private labeled merchandise which offers additional price choices to the consumer. Nevertheless, in New York State, liquor prices are relatively high and stable, the number of retailers has been about constant for fifteen years, and liquor retailing in general is profitable.

To return liquor to the open market is to return price decisions to each trade level to be made by independent businessmen. Lower prices for distilled spirits and perhaps heightened efficiency of distribution would result.

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## V. THE DEMAND FOR DISTILLED SPIRITS

### A. Introduction

The determinants of the demand for legal distilled spirits are many. The list includes ethnic and religious factors, the nature and stringency of control systems,<sup>96</sup> the availability and prices of competing goods, the degree of urbanization, advertising, and the mores governing the frequency and types of social gatherings. Even container size is a variable at times. The economist has tended to delimit his analysis to such quantifiable variables as price and income. He has tended to hold "taste" constant, a variable that covers a multitude of complex variables in this world.<sup>97</sup> This economic analysis, similarly, concentrates on the effect of price and income changes on the purchase of distilled spirits.<sup>98</sup>

The term "purchase" is chosen deliberately, although the statistics are usually collected in terms of "apparent consumption." This latter term suggests actual imbibing. Unfortunately, the data are not sufficiently refined to account for actual consumption. Sales data are not always retail sales data; they are often reconstructions of tax payments recorded as spirits enter a state or sometimes an accounting of shipments to wholesalers. There is, therefore, a problem of inventorying at wholesale, retail, and consumer levels.

Another important problem stems from the fact that sales data are generated for political subdivisions rather than economic markets. Since packaged liquor is easily transported by consumers across state lines, sales data of small political areas such as states are distorted to some degree. This is especially true for such a well known low price market as Washington, D. C. Along these lines, one can also point to the problem of transients who consume distilled spirits. If the transients reside in other states, their influence is dissolved in national data, although the local statistics remain contaminated; if the transients are foreigners, their influence cannot be

96. Effective prohibition of the production and sale of beverage spirits depresses the consumption of the legal product.

97. See Harold L. Wattel, *op. cit.*, Chapter 4 deals at length with the many variables. For example, in the immediate post-war period the introduction of television was considered a depressing influence on distilled spirits consumption because it tended to reduce attendance at night clubs.

98. There is good precedent for doing so. See A. R. Prest, "Some Experiments in Demand Analysis," *The Review of Economics and Statistics*, February, 1949, p. 45.

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erased, and if their influence is limited to one or two local markets, the problem is intensified, as in the sales data for New York State and Washington, D. C.

Analyses of distilled spirits "consumption" are prepared, nevertheless, since government, business, and consumer groups need to know more about this aspect of our behavior.<sup>99</sup> These studies divide functionally into two groups, those which are based on current field investigations such as budget studies and market analyses, and those which rely for the most part on data generated from other diverse sources, such as studies which correlate income and "consumption" or expenditure data. Let us turn now to the lessons we have learned from each of these.

### B. *The Market Studies*

What have we learned from market studies? Among other things, the following findings have gained currency:

1. Households which serve distilled spirits are less numerous than those which do not. The ratio is about 60% for those which do not serve, as compared with 40% for those which do.<sup>100</sup>

2. The percentage of households purchasing or serving distilled spirits increases as income increases.<sup>101</sup> One of the first postwar

99. The need for accurate analyses is mirrored in this conflicting testimony about consumer behavior. First, the New York State Liquor Authority commented as follows on distilled spirits purchases during the liquor price wars in New York City in 1940:

"One definite conclusion which can be drawn is that the sharp decline in prices increased consumer purchases, which were stimulated by the impression created by industry members that the reduced prices were temporary. This caused an abnormal bargain seeking demand on the part of many consumers who stocked up with liquors for future consumption."

*1940 Report of the New York State Liquor Authority*, p. 14.

Alfred E. Driscoll, former New Jersey Alcoholic Beverage Commissioner, in testimony to a Senate committee said:

"Now liquor, in contrast to other commodities, is not an article which the average person saves . . . when he goes in and buys a bargain in liquor, as he thinks, is likely to consume it in a short period of time and then try to go out and buy another bargain."

*Senate Judiciary Hearings on S. Res. 206, 78th Congress, 2nd Session, 1944*, p. 213.

100. *Time Research Report #1204, Facts on the U. S. Market for Distilled Spirits*, p. 3.

101. In addition to studies which follow, see *The Liquor Handbook, 1957*, p. 32.

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studies in this area was executed by the U. S. Department of Agriculture, which reported the following statistics for urban families in 1948:

TABLE 16

Purchased Beverages (whisky, rum, gin, brandy, cordials) Percentage of households using and Expense per Household, United States, 1948

	Per Cent	One Week's Expenditure (dollars)
All incomes .....	8.0%	\$276
Under \$1,000 .....	3.8	.127
1,000-1,999 .....	1.5	.037
2,000-2,999 .....	3.9	.111
3,000-3,999 .....	6.6	.243
4,000-4,999 .....	15.6	.527
5,000-7,499 .....	13.0	.315
7,500 and over .....	25.0	1.233
Not classified .....	10.9	.404

Source: U. S. Department of Agriculture, *Food Consumption of Urban Families in the United States* (Agriculture Information Bulletin No. 132), p. 85.

Recent commercial market studies support these earlier findings, e.g., Daniel Starch's analysis for *Time* for 1960:

TABLE 17

U. S. Non-Farm Households Drinking or Serving Distilled Spirits\*  
Within Income Groups, 1960

Annual Income	Drink or Serve Whiskey (Per Cent)
\$10,000 and over .....	68%
7,000-9,999 .....	60
5,000-6,999 .....	50
4,000-4,999 .....	42
Under \$4,000 .....	23

\* Does not include brandy or cordials.

Source: *Time Research Report*, #1204, *Facts on the U. S. Market For Distilled Spirits*, p. 4.

3. Households with heads who hold professional or managerial jobs tend to have a higher percentage drinking or serving whiskey than those whose heads are blue collar workers. Although the studies tend not to indicate it, this finding is not surprising, since job level and income tend to move together in our society.

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TABLE 18

**U. S. Households Drinking or Serving Distilled Spirits\*  
Within Occupation Groups, 1960**

<u>Occupation or Household Head</u>	<u>Drink or Serve Whiskey</u>
Managers, Officials .....	60%
Professional, Technical .....	58
Business Owners .....	52
Sales .....	51
Clerical .....	47
Craftsmen .....	45
Operatives .....	40
Service Workers .....	34
Farmers and Farm Laborers .....	21
Housewives .....	14

\* Does not include brandy or cordials.

Source: *Time Research Report*, #1204, p. 8.

4. The percentage of households drinking or serving whiskey tends to decline with age of household head once the head of the house reaches the age of 34 years.

TABLE 19

**U. S. Households Drinking or Serving Distilled Spirits\*  
Within Age Groups, 1960**

<u>Age of Household Head</u>	<u>Drink or Serve Whiskey</u>
65 and over .....	20%
55-64 .....	33
45-54 .....	42
35-44 .....	48
25-34 .....	51
18-24 .....	40

\* Does not include brandy or cordials.

Source: *Time Research Report*, #1204, p. 8.

5. The more dense the urban area, the larger the percentage of the population which drinks spirits. For example, it has been reported that 25 per cent of the rural population of the nation drink spirits, 50 per cent of the population of cities having a population between 2,500 and 25,000 persons, 58 per cent in areas between 25,000



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and 500,000 persons, and 73 per cent of those living in cities of 500,000 persons or more.<sup>102</sup>

6. According to a Gallup national survey, drinking increases with educational achievement. For example, 48 per cent of grammar school graduates, 67 per cent of high school graduates, and 71 per cent of college graduates consume alcoholic beverages.<sup>103</sup>

Many of these market studies also suggest that status considerations are important determinants of consumer behavior in the purchase of distilled spirits.<sup>104</sup> Such findings as these are useful although much of the other material uncovered in the course of the surveys relates to decisions affecting brand preferences, a matter of special interest to firms commissioning the studies.

If these survey findings are valid, the nation can look forward to an increase in the total and per capita consumption of distilled spirits. Income is expected to rise. New jobs are expected to be primarily of the "higher status" white collar variety in the future. Population will continue to increase and the "war babies" will soon swell the 25-34 age category, the one having the highest percentage of households in which liquor is served. And urbanization is expected gradually but surely to engulf most of the nation.

Before one accepts such conclusions as reliable it is plausible to compare these with other published data. To this end, then, let us review these data and the results of applying the technique of correlation analysis to the problem of distilled spirits consumption.

### C. *The Published Data*

We can infer a great deal from the published data. We find that there is a segment of the market that is price conscious. The success of the private label (product with retailer's or wholesaler's label) tells us this. The industry suspects that an increasing percentage of the New York State market is being preempted by them.<sup>105</sup> One interesting sidelight to the private brand market picture is that in a market free of resale price maintenance such as Washington, D. C., the private label product has not disappeared. Statistics now being

102. *The Liquor Handbook*, 1957, p. 33.

103. Time Marketing Services—1961, *Liquor Customer Characteristics*, p. 8.

104. *The Liquor Handbook*, 1963, p. 58 ff.

105. There are no data but the trade "talks" about a 20 per cent figure.



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compiled by the Distilled Spirits Institute<sup>100</sup> suggest that these products account for about ten per cent of the market. The District's private brands are priced below private brands in New York State, but the price differential between them and national brands usually is smaller than exists in New York. (This tends to bear out the contention of the Federal Trade Commission that distillers of private label spirits exert some influence on the retail pricing of their products.)<sup>107</sup>

But how large is this price conscious consumer segment? From what income is it drawn? Is the success of the private label an indication that some consumers drink more spirits than others for the same expenditure or that some consumers are price conscious in order to maintain a particular and constant level of consumption at minimum cost? The answers to these questions are not to be found in the data at hand. And yet, these are important questions for analysis.<sup>108</sup>

Price conscious consumers, it seems, forewarned of the last federal excise tax increase from \$9.00 per proof gallon to \$10.50 per proof gallon on November 1, 1951, shifted the timing of their purchases. Consumers everywhere stocked up in anticipation of the price increase. Here, for example, is how the sales pattern changed in the nation in anticipation of the tax and price rise:

**TABLE 20**  
**Apparent Consumption of Distilled Spirits, United States,**  
**1950 — 1953**

	Annual Total	October	November	December
	(million wine gallons)		(Per cent of annual sales)	
1950 .....	190.0	8.0%	9.3%	12.9%
1951* .....	193.8	11.6	8.2	10.0
1952 .....	183.7	10.6	10.3	12.4
1953 .....	194.7	9.6	10.0	11.7

\* Tax increase effective November 1, 1951.

Source: Distilled Spirits Institute, *Apparent Consumption of Distilled Spirits, Summary 1949-1958*, p. 5.

106. Distilled Spirits Institute, *Apparent Consumption of Distilled Spirits, District of Columbia Special Report, Monthly*.
107. *Report of the Federal Trade Commission on Resale Price Maintenance*, (1945), p. 346.
108. A. R. Prest wrote: "Obviously in the case of spirits and wines, for instance, it would probably be more realistic to confine the analysis to the higher income sections. Lack of data, however, prevents this." *Op. cit.*, p. 44.

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The decline in consumption in 1952 and the changed pattern of consumption in the last three months of 1951 can be traced directly to the tax increase. (Retail prices tended to increase by the amount of the tax multiplied by the distribution markups. In Pennsylvania the price of a fifth of Seagram's 7 Crown rose by \$0.43 although the tax increase was only \$0.26. The level of all distilled spirits prices rose by \$0.34 per fifth.)

In Pennsylvania, the same alterations in purchasing habits are evident. In 1950, purchases as a percentage of the year's total were as follows for the last three months: 8.0 per cent, 8.7 per cent, and 15.4 per cent. In 1951, they were 11.9 per cent, 6.7 per cent, and 12.1 per cent. By 1953, they were back to "normal" with 8.8 per cent, 8.7 per cent, and 14.7 per cent. But the question remains, "Did consumers shift to lower priced distilled spirits after the tax change?" After all, the price level rose from \$3.95 in 1950 to \$4.29 in 1952, an increase of almost 11 per cent.

TABLE 21

Whisky Purchases by Price Class (Fifths),  
Pennsylvania, 1950-1953

	1950	1951	1952	1953
Under \$3.00 .....	9.2%	8.3%	8.9%	8.8%
\$3.00-\$3.24 .....	2.7	.5	.5	.6
3.25 .....	2.6	2.1	2.7	2.4
3.50 .....	36.1	1.4	1.5	1.3
3.75 .....	2.5	3.2	2.3	2.0
\$4.00 .....	34.2	34.9	35.7	35.1
4.25 .....	2.7	35.2	33.6	33.0
4.50 .....	.8	1.2	2.1	2.6
4.75 .....	.9	3.1	3.3	4.5
\$5.00 and over .....	8.5	10.2	9.5	9.8
Total .....	100.2%	100.1%	100.1%	100.1%
Benchmark Prices:				
Seagram 7 Crown .....	\$4.03	\$4.46*	\$4.46	\$4.46
Haller's Special Res. ..	3.69	4.15*	4.15	4.15

\* After tax increase.

The statistics in Table 21 show that consumers continued to purchase their favorite brands despite the price increase. The price class \$3.50-\$3.74, which accounted for approximately 36 per cent of whisky purchases before the tax increase, accounted for less than two per cent after the tax increase. The price class \$4.00-\$4.49, which accounted for almost 37 per cent of whisky sales before the tax change, accounted for almost 70 per cent after the change. Brand

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loyalties apparently were maintained despite the price change. It cannot be claimed that a lack of choice forced consumers into this pattern. For spirit blends alone, the following price ranges prevailed: 1950—\$2.89 to \$4.89 per fifth; 1951 (after the tax increase)—\$3.29 to \$5.31; 1952—\$3.25 to \$5.31; and in 1953—\$3.43 to \$5.31. The change in total consumption, which also interests us, is dealt with within the framework of the correlation analysis for consumption, income, and prices to be discussed later.

What other evidence is available on this subject? Often, the low prices and high apparent consumption of such areas as New Hampshire and the District of Columbia are cited as conclusive proof that the demand for liquor is price sensitive. Such variables as transient population and out-of-state purchases are ignored. (A fuller treatment of inter-area differences is provided below in the form of a correlation analysis taking into account income as well as price.)

If we turn to Pennsylvania, once again we find that taste changes<sup>109</sup> developed rather steadily through the entire postwar period. What cannot be ascertained, however, is the degree of change that might have taken place had income and price not changed at the same time.

In Table 22, the reader will find data indicating that proportionally, sales of neutral blend whiskies, the cheaper product, decreased; and sales of straight whiskies, the more expensive product, increased, in spite of a rising price level for distilled spirits in Pennsylvania. On the other hand, distilled spirits and whiskies apparently lost ground at the time of the federal tax increase in 1951. One could argue that the drop in each case in 1952 below the level of 1950 stemmed from the purchases for inventory that swelled the sales figures of 1951.

For some, price is an important factor shaping their consumption time preferences. Taste factors, on the other hand, are clearly reshaping the overall market as neutral blends give way to straights. But do taste and price combine to depress the influence of whisky as distilled spirits sales increase? What role does income play in these changes?

Let us now turn our attention to the influence of income on demand patterns. Field studies, it was noted above, found income to have a strong influence on the consumption of distilled spirits.

109. Traditional economic analysis assumes no change in tastes during the period of analysis. Statistical techniques are not adequate for this problem.

**TABLE 22**  
**Prices and Market Shares of Selected Distilled Spirits Types,  
Pennsylvania, 1947-1962**

Year	Average Price of Distilled Spirits				Percentage of Wine-Spirits Market Held By				
	All	Neutral Blends	Straight Bourbon	Top Ten Brands	Distilled Spirits based on gallon sales	Whisky	Neutral Blends	Straight Bourbon based on case sales	Top Ten Brands % of Dist. Sp. Sales
1947	\$3.95	\$3.61	\$4.93	\$3.83	56.21%	49.35%	47.55%	0.22%	54.71%
1948	4.03	3.76	4.83	3.85	51.66	45.94	44.73	.38	61.32
1949	4.01	3.72	4.32	3.72	49.47	44.07	42.90	.55	62.10
1950	3.95	3.69	4.23	3.87	49.97	44.62	42.33	.83	60.57
1951	4.02	4.08	4.72	4.30	52.03	46.35	43.79	1.14	59.20
1952	4.29	4.02	4.63	4.35	49.11	43.40	40.74	1.34	58.13
1953	4.30	4.06	4.70	4.36	50.22	44.23	40.01	1.48	55.86
1954	4.31	4.06	4.72	4.38	49.20	43.10	37.98	1.76	53.79
1955	4.33	4.08	4.74	4.39	50.96	43.91	37.73	2.15	52.31
1956	4.38	4.14	4.81	4.40	53.67	45.64	38.25	2.75	50.71
1957	4.42	4.19	4.83	4.49	54.63	45.76	37.37	3.40	48.75
1958	4.42	4.18	4.86	4.45	55.31	46.26	36.80	4.31	47.39
1959	4.42	4.18	4.90	4.48	56.67	46.70	36.19	5.53	46.62
1960	4.56	4.32	5.09	4.66	56.01	45.98	34.88	6.33	46.86
1961	4.56	4.31	5.08	4.66	56.25	45.22	34.35	6.52	45.58
1962	4.51	4.27	4.97	4.64	57.22	45.22	33.98	6.50	44.84

Source: Pennsylvania Liquor Control Board Annual State Report

Source: Pennsylvania Liquor Control Board, *Annual Store Sales Analyses*.

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For the nation as a whole, personal expenditures for alcoholic beverages as a percentage of real disposable personal income has declined in the postwar period from a high in 1947 of 3.94 per cent to a low of 2.89 percent in 1959. In 1962, the percentage stood at 2.92.

Since personal saving in this period increased from \$4.7 billion in 1947 to a high of \$29.1 billion in 1962, it would appear that consumers might have spent more of their income on distilled spirits if they were so inclined. The decline in the percentage of real disposable personal income spent on alcoholic beverages and distilled spirits in particular is not to be explained in terms of price increases for these products. It is conceded that if savings, in effect, are institutionalized, that is, they tend to be an "expenditure" rather than a residual, this argument is weakened somewhat. It is also true, as mentioned earlier, that the distribution of income may have an important role to play in this analysis. But on the face of it, consumers seem to have the income necessary to overcome price increases so that they need not deprive themselves of their customary quantity of spirits.

The statistics of expenditures for alcoholic beverages in Pennsylvania (wine and distilled spirits only, not including the cost of service for beverages sold by the drink) indicate much the same pattern as for the nation. Expenditures declined as a percentage of real personal income after the war until the middle fifties, when the figure began to rise. The data are presented in Table 24.

In New York State, we find that real income per capita rose 7.2 per cent in the period 1957-1962 and per capita apparent consumption of distilled spirits rose 12.7 per cent. If the relationship were to hold for the future then per capita apparent consumption is likely to increase at the approximate rate of 2.5 per cent annually as real per capita income increases some 1.4 per cent annually. At these rates, per capita apparent consumption of distilled spirits in New York State would not reach the 1946 peak of 2.11 wine gallons until close to 1970.<sup>110</sup>

110. What would such an increase mean in terms of drinks? In 1960, per capita apparent consumption is recorded at 1.81 wine gallons which translates into 232 ounces per person. Since only a portion of the population is adult, this figure can be increased to 359 ounces per adult (over 21 years of age). An increase of ten per cent in apparent consumption turns out to be an increase of less than one ounce per week per adult person in New York State. The reader should be reminded that apparent consumption data for New York do not separate out the consumption of the transient population.

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TABLE 23  
Expenditures for Alcoholic Beverages and Real Disposable Personal Income,  
United States, 1947-1962

Year	2 Real Disposable Personal Income (1957-9 dollars) (billion)	3 Expenditures for Alcoholic Beverages			5 Expenditures as Percentage of Real Disposable Personal Income		
		Personal and Business		Total	Personal	Alcoholic Distilled Beverages Spirits (Per Cent)	8
		Personal Alcoholic Beverages	Alcoholic Beverages (million)				
1947	\$218.6	\$ 8,620	\$ 9,640	\$4,500	3.94%	4.41%	2.06%
1948	225.9	7,900	8,820	3,900	3.50	3.90	1.73
1949	228.6	7,680	8,580	3,650	3.36	3.75	1.60
1950	247.9	7,790	8,790	3,870	3.14	3.55	1.56
1951	251.4	8,060	9,160	4,180	3.21	3.64	1.66
1952	258.1	8,530	9,715	4,320	3.30	3.76	1.64
1953	270.9	8,610	9,885	4,300	3.18	3.65	1.59
1954	274.5	8,500	9,830	4,300	3.10	3.58	1.57
1955	294.1	8,700	10,090	4,470	2.96	3.43	1.52
1956	309.3	8,990	10,470	4,780	2.91	3.39	1.55
1957	315.1	9,140	10,670	4,960	2.90	3.39	1.57
1958	315.7	9,210	10,760	5,020	2.92	3.41	1.59
1959	332.1	9,605	11,225	5,270	2.89	3.38	1.59
1960	339.4	9,840	11,535	5,480	2.90	3.40	1.61
1961	349.7	10,215	11,960	5,600	2.92	3.42	1.60
1962	364.7	10,665	12,515	5,940	2.92	3.43	1.63

Sources: Column 2: Calculated by author from Disposable Personal Income Series of the U. S. Department of Commerce and Consumer Price Index of U. S. Department of Labor.

3, 4, & 5: Estimates of the Office of Business Economics of the U. S. Department of Commerce.

6, 7, & 8: Calculated by author from data in columns 2-5.

TABLE 24

Expenditures for Wine and Distilled Spirits and  
Real Personal Income, Pennsylvania, 1947 — 1962

1	2	3	4
Year	Real Personal Income (1957-9 dollars) millions	Expenditures of Wine and Spirits (millions)	Expenditures as a Percentage of Real Personal Income
1947 .....	\$17,681	\$208.4	1.18%
1948 .....	17,752	208.2	1.17
1949 .....	17,796	198.3	1.11
1950 .....	19,662	213.0	1.08
1951 .....	19,931	226.1	1.13
1952 .....	20,456	227.3	1.11
1953 .....	21,615	239.4	1.11
1954 .....	20,910	230.7	1.10
1955 .....	22,193	238.4	1.07
1956 .....	23,664	255.0	1.08
1957 .....	24,005	269.4	1.12
1958 .....	23,418	272.8	1.16
1959 .....	24,391	279.9	1.15
1960 .....	24,771	299.8	1.21
1961 .....	24,900	299.2	1.20
1962 .....	25,509	308.1	1.21

Sources: Column 2: U. S. Department of Commerce Personal Income Series, found in *Survey of Current Business*, August issues. Series deflated by U. S. Department of Labor's Consumer Price Index.

Column 3: Pennsylvania Liquor Control Board, *Annual Store Sales Analyses*.

Column 4: Column 3 ÷ Column 2.

Income is a prime factor in determining liquor consumption. Yet, as income has increased, savings have increased absolutely and relatively, while expenditures for alcoholic beverages have increased absolutely but decreased relatively. To extract the influence of price from this complex is a difficult task. Historically, correlation techniques are employed for this task.



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### D. *Correlation Studies*

One of the more powerful tools available to researchers is correlation analysis. It may be used to test the dependence of one variable on one or more other variables at a point in time (cross section analysis) or through time (time series analysis). When these are used in conjunction with one another and in the last analysis contained by economic reasoning, "Briefly stated, most of the controversies spring from a failure to realize that in each and every application the hypothesis of a casual dependence has to be indicated and supported by nonstatistical considerations. As regards demand analysis, in particular, the regression analysis has to be directed by economic arguments."<sup>111</sup>

This is not to suggest that within these bounds there are no difficulties. On the contrary, the more progress experienced in this field, the less willing researchers are to accept unsophisticated findings. Dissatisfaction with time series analysis because of the possibility that the supposedly independent variables may themselves be linked in some systematic fashion (multicollinearity)<sup>112</sup> and that any one series may be feeding upon itself in some systematic fashion (autocorrelation) have pushed investigators to fashion tests to determine the existence of these and to develop solutions.<sup>113</sup> While the current state of the art is not perfect, researchers believe that positive benefits are to be obtained from present techniques. Of course, statistical answers in the hands of investigators may mean one thing; in the hands of policy makers, another.

Without attempting to pass on the reliability of the studies, the following findings are offered to give the reader an appreciation of the range of results that has accumulated in the literature. It should be recognized that the basic data employed and their limitations may be as responsible for the variations in findings as the techniques employed.

111. Herman Wold and Lars Jureen, *Demand Analysis*, p. 57. They are valuable even for demand analysis. See reservations of one researcher in this field: A. R. Prest, *Some Experiments in Demand Analysis*, *The Review of Economics and Statistics*, February, 1949, pp. 33-49.

112. *Ibid.*, pp. 46-48.

113. Michael Brennan, *Preface to Econometrics*, pp. 347-351.

TABLE 25

Measures of Price Elasticity of Demand for  
Distilled Spirits

Researcher	Basic Data Employed and Period	Finding: A 10% Decrease in Price would Increase Sales By
1. Boni, Watkins, Mounteer and Co.	National experience, 1937-1941, 1948-1952	4.7%*
2. Boni, Watkins, Mounteer and Co.	National experience, 1937-1952	2.2 *
3. U. S. Treasury	Not stated	14.8 *
4. U. S. Treasury	Not stated	9.2 *
5. Boni, Watkins, Mounteer and Co.	Colorado experience, 1937-1941, 1948-1951	1.3 *
6. Boni, Watkins, Mounteer and Co.	Georgia experience, 1939-1941, 1948-1951	14.8 *
7. Boni, Watkins, Mounteer and Co.	Illinois experience, 1937-1941, 1948-1951	12.8 *
8. Boni, Watkins, Mounteer and Co.	Massachusetts experience, 1937-1941, 1948-1951	11.9 *
9. Boni, Watkins, Mounteer and Co.	Pennsylvania experience, 1936-1951	6.5 *
10. Boni, Watkins, Mounteer and Co.	Monopoly state experience, 1948	24.0 *
11. U. S. Treasury	Not stated	5.8 **
12. Richard Stone	British experience, 1920-1938	5.7 †
13. A. R. Prest	British experience, 1870-1938	8.6 ††

Sources: \* Boni, Watkins, Mounteer & Co., *Economic Factors Underlying Sales and Public Relations Problems of the Distilled Spirits Industry*, Appendices, Table VII—4.

\*\* Harold Wattel, *op. cit.*, p. 294.

† Richard Stone, *The Measurement of Consumers' Expenditure and Behaviour in the United Kingdom, 1920-1938*, Volume 1, p. 390.

†† A. R. Prest, *op. cit.*, pp. 40 ff.

The lessons to be learned from investigations utilizing correlation techniques are somewhat less clear perhaps than those drawn from the field studies. First, few demand analyses for distilled spirits exist in the literature. One reason for this is the lack of reliable basic data. Price series, for example, are not generally available except for control states. Second, no separate investigation of the New York market exists. To draw any policy conclusions about New York behavior on the basis of experience elsewhere may involve error. Third, the range of price elasticities is great; only five of the 13 cases cited suggest a relatively elastic demand, that is, a more than proportionate increase in quantity demanded as a result of a price decline.

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Fourth, the last published analysis is ten years out of date. No analysis covers the postwar period. There is reason to believe that consumption estimates are affected by the degree of unemployment in the economy and so prewar experience may not be a good guide to our present full employment situation.

In light of the above, it was deemed desirable to undertake additional analyses on the basis of the new evidence available.

Three correlation analyses were attempted, namely, a cross section analysis for Pennsylvania counties for 1960 (income versus expenditures for wine and spirits); a second, a time series analysis for Pennsylvania for the period 1947-1962 (apparent consumption per capita of distilled spirits in wine gallons versus real income per capita and the average price of distilled spirits); and last, a cross section analysis of control state experience for 1960 (apparent per capita consumption of distilled spirits in wine gallons versus median family income and the average price of distilled spirits).<sup>114</sup>

Why did not the author analyze the national market and the New York State market? The answer is that there are no reliable price data for either the nation or New York State. Since the data used, *e.g.*, population estimates, are already subject to error, market areas are poorly delineated, apparent consumption is not consumption, and transients are not accounted for, additional errors in the form of assumed prices were not warranted. Appendices A, B, and C contain the statistical results. Unfortunately the regression coefficients were deemed insufficiently significant. Therefore one cannot forecast with any great degree of certainty the effect of a change in price and income on distilled spirits expenditures and consumption on the basis of correlation analyses. The history of the industry suggests that consumption patterns do not change radically and that the demand curve is for the most part price inelastic. A ten per cent decrease in price will be followed by an increase in sales of less than ten per cent.

114. The least squares method applied to the *logarithmics* of the basic data employed throughout. A. R. Prest in his analysis of British spirits consumption indicates that he favored the logarithmic approach although he cautioned that "there is no single unambiguous answer if anyone queries: Which is the more 'reliable' between linear and logarithmic estimates?" *Op. Cit.* p. 40.

## VI. CONCLUSION

When measured against the economic standards of efficiency, distribution, and equity, the case for the free market is formidable.<sup>115</sup> In such a free market, there is no place for resale price maintenance.

The removal of State policed resale price maintenance for distilled spirits in New York State<sup>116</sup> would change the marketing arrangements for these products even though the presence of a general voluntary resale price maintenance law in the State makes possible the continuation of some degree of vertical price fixing. Nevertheless, the removal of compulsory resale price maintenance would tend to reduce the price level of distilled spirits in New York State. How far and how fast prices would fall is difficult to forecast with great precision.

One variable in the picture is the speed and extent to which distillers place their brands under the protection of the State's general resale price maintenance law, the Feld-Crawford Act. If all distillers fair-traded their brands of spirits (this appears unlikely), overt price cutting might not develop immediately. The fewer the

115. There is ample literature in the Anglo-American economics demonstrating this position. Two classics are A. C. Pigou, *The Economics of Welfare*, and A. P. Lerner, *The Economics of Control*.

116. Charles Hession in his "*The Economics of Mandatory Fair Trade*", *Journal of Marketing*, April, 1950, concluded that it should be removed. On the other hand, opposition to the elimination of resale price maintenance for liquor in New York State will arise. The industry, for example, has always claimed that it is *sui generis*, and hence must be treated differently from every other business.\* Indeed, there would be few who would deny that Prohibition constituted a traumatic experience for the alcoholic beverage industry and recognize why the industry is fearful lest any new arrangement recreate conditions that led to national Prohibition. The industry is likely to maintain that lower retail prices may lead to intemperance and consequences inimical to the public welfare.

But price levels which are "too low" as the result of private market forces may be raised by taxation. Monies now distributed at all levels of trade could be transferred to the public purse. Consumers, instead of benefiting directly from lower prices for their liquor, could benefit indirectly through the reduction of other taxes or through additional socially desirable expenditures.

It is also maintained that high liquor taxes foster "moon-shining" (illegal production), and "bootlegging" (illegal transport). (See Joint Committee of the States to Study Alcoholic Beverage Laws, *Impact on Alcoholic Beverage Control of Taxation and Mark-Up*, 1953, p. 27.) While revenue and sumptuary purposes of taxes often become intertwined, the purpose here is clear. First, the tax would be imposed for control only. Second, the tax would be set so that it would not increase the current spread between the cost of production and the final sale price.

\* Cf. *Alcoholic Beverage Control*, An Official Study by the Joint Committee of the States to Study Alcoholic Beverage Laws. (Revised 1960).

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brands fair-traded, of course, the more intense will be the price competition.

Price competition will develop for fair-traded items. Distiller policing of prices under the Feld-Crawford Act is likely to be sporadic and ineffective as compared with State policing in a market as large as New York State. Since some distillers fair-trade their products wherever possible under duress of retailers, one can view general fair-trade as a temporary obstacle to open price competition rather than an impregnable barrier to it. Even with State policing, sporadic covert price cutting exists. Nevertheless, it is doubtful that any national distiller whose sales volume is threatened by price cutting on competing national brands will be able to hold the price line on a fair-traded national brand. One may conclude, therefore, that open price competition in distilled spirits is likely to develop shortly after the demise of State enforced resale price maintenance.

Open price competition in distilled spirits may lead to significant price cuts. Prices in the District of Columbia now are approximately one dollar a fifth below New York prices for national brands of whisky and somewhat smaller differentials exist for private brands. New York prices, if no tax changes develop, will approach those of the District. Whether the new "free" prices prove to be uneconomic will depend upon the actions of distillers, wholesalers, and retailers. Throughout the American industry, manufacturers complain that distributors tend to shave their profit margins to uneconomic levels. In turn, distributors use competitive pressures at their levels to justify their demands for price reductions from manufacturers. But manufacturers do not always wait for pressures from distributors to cut prices; rather, in seeking to widen their market, they may cut prices to distributors. They hope that these reductions will either be passed along to consumers to stimulate demand or if not passed along, will reward distributors for pushing their products as against those of competitors.

If no inter-level industry subsidy develops in liquors, then there is a predictable level below which prices can not fall and remain for very long. If liquors are to be marketed, the distribution process must be sufficiently profitable to attract enterprises. But since profit margins tend to be artificially high under resale price maintenance, some shaving of margins will develop and will force inefficient and small volume stores from the market. It is not be expected that the

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increase in sales volume will be sufficient to offset the downward slide of margins for such firms. An increase in sales volume, however, will often soften the blow of falling prices and margins for many retailers. The magnitudes involved are set out in Table 26.

TABLE 26

Hypothetical Sales/Profit Analysis Assuming 10 per cent Decline in Price,  
Different Price Elasticities of Demand, New York, Circa 1962

Price Elasticity of Demand	Off Premise Sales* (million wine gallons)	Gross Profits Distilled Spirits Sales** (million dollars)	Average Profits Per Licensee† from Distilled Spirits Sales
Assumed Orig. Avg. Price \$4.70 fifth	24.3 Orig.	Orig. per w. g. \$132.4	Orig. \$31,353
0.6	25.8	\$100.6	\$23,805
0.7	26.0	101.4	23,994
0.8	26.2	102.2	24,184
0.9	26.5	103.4	24,468
1.0	26.7	104.1	24,633
1.1	27.0	105.3	24,917
1.2	27.2	106.1	25,106
1.3	27.5	107.3	25,390
1.4	27.7	108.0	25,556
1.5	27.9	108.8	25,745

NOTE: Figures have been rounded. Because of statistical "base" problem, revenues are slightly understated.

\* Assumed to be 75 per cent of total. Total—32.4 million w.g.

\*\* Price average assumed to be \$4.70. Retail profit assumed to be \$1.09 per fifth and 67 per cent of price reduction borne by retailer. Original profit per w.g. \$5.45, after ten per cent price reduction, \$3.90.

† 4,226 licensees.

Source of original data: Distilled Spirits Institute. Margin information from survey of current markup policies in State which are close to 30 per cent on invoice cost.

The process by which New York State moves from liquor resale price maintenance to a free market in liquors will have an important bearing on the effects of such a changeover. The State will want to watch very closely its effect on prices, the effect of prices on sales, the effect of sales on consumption, and the effect of consumption on social behavior. A moderate and predictable rate of changeover will be less liable to disturb traditional price and social patterns and will provide a greater opportunity for observation and study of the consequent reactions.



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At least two general alternatives exist for a moderately paced transition from price maintenance to the free market. First, individual liquor "types" may be removed from the umbrella of fair-trade at periodic intervals, e.g., wines, foreign whiskies, spirit blend whiskies, straight whiskies, and bonded whiskies might be freed in this order from resale price maintenance at six month intervals. This would give both consumers and distributors time to adjust to the new price patterns.

Second, a tax may be applied to the price of the spirits as they entered the State which would compensate for almost all of the expected price decline when the products are taken out from under resale price maintenance. A timetable for the reduction of the tax may be written into law so that an orderly downward adjustment in prices is insured. The advantage of this approach is that no dramatic price break would be permitted and hence little change in consumption patterns may be expected to develop.

From the distributor's viewpoint, he would be able to take a markup on the tax in an effort to protect his profit margin in the transition period as the next example shows.

For example, Seagram's 7 Crown is now marketed by the distiller at approximately \$32.95 per case of fifths not including transportation charges. In New York, a fifth retails at \$4.99 and in Washington, D. C. at about \$3.83 per fifth. The "state" tax in both markets is \$1.50 per wine gallon or \$3.60 per case of fifths although New York State levied additional fees in 1963 which raised retail prices some twenty cents per fifth. The fifth of distilled spirits entering distribution channels then costs the wholesaler about \$3.05. Distribution costs \$1.94 or 64 per cent of invoice costs in New York State and \$0.78 or 26 per cent of invoice costs in Washington, D. C. If the price of this whisky is expected to fall in New York to the Washington, D. C. price, this result could be prevented through an additional levy of 20 per cent before it entered trade channels. A 20 per cent tax would raise the price to about \$3.65 to wholesalers, and when trade channels completed their markup procedures, the price would be about \$4.60, assuming a combined markup of 26 per cent on invoice costs. The new price would represent a decline of less than four per cent over the old. Over a period of four years, the additional levy could be reduced gradually to 15 per cent, 10 per cent, five per cent, and then removed entirely.



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Some rearrangements within the wholesaling and retailing sectors will develop. But the careful removal of fair trade is not liable to disturb significantly the economic and social patterns of most New York State residents even in the initial stages of the experiment. Sales of distilled spirits as reflected in tax receipts will increase; there is some danger that this increase in sales will be interpreted by "prohibition forces" as an increase in anti-social behavior. It would be unfortunate, indeed, if such an interpretation were left to stand.

As noted earlier, total and per capita consumption of distilled spirits are likely to rise in the future as population increases, as families enjoy higher real incomes, and as the educational levels of the population rise. A price decline resulting from a more competitive market for distilled spirits will improve sales from these quarters:

1. *Increased consumption on the part of traditional consumers.* This is likely to be slight. The consumption of distilled spirits tends to be culturally determined and as such has an upper limit.
2. *New consumers.* This may be an important factor as consumers shift from other alcoholic beverages to distilled spirits. The intake of absolute alcohol may not be affected by this switch from one beverage to another.
3. *Sales to out-of-state residents.* A price differential for distilled spirits favorable to New York may induce consumers in neighboring states to shift their purchases to New York State stores. This will be especially true for those out-of-state residents who commute to work in this State.
4. *Domestication of purchases by residents who now buy their liquor in other markets.* There is a segment of New York consumers that buys liquor in such low price markets as the District of Columbia and New Hampshire. Were New York State prices to become competitive with prices in these markets, New York consumers would tend to buy in the local market.
5. *Sales induced by price anticipations.* If consumers are led to expect lower distilled spirits prices in New York State in the near future, purchases will be held to a minimum and stocks drawn down. Immediately following the removal of fair-trade, purchases would be made for immediate consumption and for the replenishment of inventories. Were wholesalers

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and retailers to follow this pattern of behavior also, sales following the removal of fair-trade (as reflected in tax receipts of liquor entering the State) would be swelled further. Yet, actual consumption by individual consumers would not be affected by these purchasing changes.

In other words, marketing and sales patterns are more likely to be affected by the removal of resale price maintenance than any single individual's intake of beverage alcohol.

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## APPENDIX A •

## Pennsylvania County Analysis 1959

A description of the series for the Pennsylvania County single correlation analysis follows:

1. *Expenditures for alcoholic beverages.* The store sales analyses of the Pennsylvania Liquor Control Board provides sales data for stores by county within Pennsylvania. No breakdown was available for distilled spirits purchases alone. Data were obtained for 1959, the only year for which reliable family income data were available.

2. *Income.* Median family income data for 1959 were obtained from the Bureau of the Census' *County and City Data Book*, 1962.

3. *Correlation Techniques.* The least squares method applied to the logarithms of the data were employed for this problem. IBM multiple regression package 6.0.043 was utilized.

Pennsylvania County	Expenditures for Wine and Spirits 1959	Median Income 1959
Montgomery .....	\$46.77	\$7,632
Monroe .....	41.50	5,093
Philadelphia .....	38.57	5,782
Delaware .....	36.07	7,289
Allegheny .....	35.23	6,173
Bucks .....	34.69	6,782
Chester .....	30.33	6,604
Erie .....	28.37	5,736
Pike .....	26.23	4,872
Beaver .....	26.20	5,777
Dauphin .....	25.41	5,796
Lehigh .....	24.20	6,064
Northampton .....	23.31	5,709
Cameron .....	22.58	6,548
Lackawanna .....	22.16	4,896
Washington .....	21.46	5,386
Cumberland .....	21.12	6,046
Westmoreland .....	20.73	5,597
Luzerne .....	19.89	4,722
Crawford .....	19.24	5,110
Berks .....	19.23	5,799
McKean .....	18.85	5,299
Mercer .....	18.71	5,872
Cambria .....	18.17	4,753
Wayne .....	18.07	4,444

[fol. 119]

Pennsylvania County	Expenditures for Wine and Spirits 1959	Median Income 1959
Elk .....	\$17.89	\$5,641
Sullivan .....	17.36	4,322
Butler .....	17.32	5,815
Carbon .....	17.32	4,815
Warren .....	17.30	5,756
Lawrence .....	16.95	5,617
Fayette .....	16.90	4,291
Lycoming .....	16.06	5,235
Schuylkill .....	15.32	4,605
Venango .....	14.96	5,307
Centre .....	14.94	5,202
Armstrong .....	14.63	5,033
Blair .....	14.60	5,141
York .....	14.09	5,678
Susquehanna .....	13.95	4,815
Lancaster .....	13.73	5,810
Potter .....	13.49	4,547
Jefferson .....	13.47	4,568
Clarion .....	12.79	4,804
Bedford .....	12.65	4,265
Somerset .....	12.51	4,055
Lebanon .....	12.43	5,512
Northumberland .....	11.90	4,544
Franklin .....	11.77	4,882
Bradford .....	11.72	4,906
Clinton .....	11.49	5,207
Clearfield .....	11.35	4,640
Columbia .....	11.26	4,855
Greene .....	10.89	4,441
Wyoming .....	10.89	4,247
Indiana .....	10.84	4,907
Tioga .....	10.51	4,775
Huntington .....	10.39	4,138
Montour .....	10.31	5,134
Adams .....	9.63	4,945
Mifflin .....	9.12	4,860
Perry .....	8.12	4,725
Fulton .....	7.87	3,857
Snyder .....	7.09	4,648
Juniata .....	5.66	4,062

4. *Pennsylvania County Experience*

Series employed: (a) Expenditures in dollars for wine and spirits by County in Pennsylvania, 1959.

[fol. 120]

(b) Median family income by county, Pennsylvania, 1959.

<u>Term</u>	<u>Statistic</u>	<u>Significance at Five Per Cent Level</u>	<u>Confidence Limits (Three Standard Errors)</u>
$R^2$	0.511	Significant	—
b	0.232	Significant	0.227 to 0.237

Estimating equation:

$$\log Y_e = 3.4310 + 0.2319 \log X_1$$

[fol. 121]

## APPENDIX B

## Pennsylvania Analysis 1947 — 1962

A description of the statistical data used for Pennsylvania time series multiple correlation analysis follows.

1. *Consumption of distilled spirits.* These data were obtained from the Store Sales Analyses published annually by the Pennsylvania Liquor Control Board. Data supplied are for total consumption only. Per Capita data have been calculated by dividing total consumption by population 21 years of age and over.

2. *Population.* There is no single statistical series showing the adult population of Pennsylvania annually. Therefore the estimates of the U. S. Bureau of the Census for the total population of Pennsylvania for Census and intercensal years have been used. These are found in the appropriate issues of the U. S. Statistical Abstract. Reports for the Census years of the proportion of the population 21 years of age and older have been used to estimate the proportion of the population in this age category for the intercensal years. These proportions were then applied to the Bureau of the Census data. No attempt was made to correct this resulting series for the proportion of the population residing in areas which prohibit the sale of packaged alcoholic beverages. According to the Distilled Spirits Institute this percentage has never been large for Pennsylvania although a larger percentage of counties does prohibit the sale of distilled spirits by the drink.

3. *Income.* There is no annual statistical series showing the disposable personal income for Pennsylvania on a total or per capita basis. There are estimates for intermittent years only. Rather than risk the possibility of introducing an element of error into this series by estimating for the years for which no data were available the decision was made to use the published series of the Department of Commerce for per capita personal income in Pennsylvania. These data are available in the August issues of the *Survey of Current Business* (U. S. Department of Commerce).

The income series was then deflated by dividing by the Consumer Price Index of the U. S. Department of Labor's Bureau of Labor Statistics.

[fol. 122]

4. *Prices.* There is no published reliable series on distilled spirits prices. Therefore it was necessary to construct such a series. The problems inherent in such a construction are many and the decisions for solution are in a sense arbitrary. The construction proceeded in this manner.

Prices of fifths of distilled spirits were drawn from the annual Store Sales Analyses of the Pennsylvania Liquor Control Board. These prices were grouped in classes designated by the Board, e.g., Bourbon (Bottled-in-Bond), Bourbon (Straight), etc. These groups were weighted by the average case sales for the period under study. The number of brands was not permitted to influence the calculations. For instance, the liquor stores in Pennsylvania retail a relatively large number of brands of cordials but these distilled spirits comprise a minute portion of the spirits sold. In effect, each spirit type was considered as a different product and weighted appropriately. If each year's sales had been used as weights, the index would have reflected both price and volume changes, e.g., Pennsylvania consumers moved away from the relatively low priced spirit blends toward the relatively high priced straight whiskies. A price index of offerings was thus obtained. A case can be made for the introduction of the volume changes as a reflection of the price offerings *as visualized by the consumer*. The Bureau of Labor Statistics does attempt to change its weightings every decade. The constant weight series shows a much lower rate of increase than does the variable weight series.

5. *Correlation technique.* The least squares method applied to the logarithms of the original data were employed for this problem. IBM Regression Package 6.0.043 was utilized.

Year	Per Capita Consumption (gallons)	Per Capita Real Income (dollars)	Average Price Per Fifth of Distilled Spirits
1947 .....	1.477	\$1,733	\$3.95
1948 .....	1.440	1,726	4.03
1949 .....	1.341	1,713	4.01
1950 .....	1.423	1,869	3.95
1951 .....	1.494	1,916	4.02
1952 .....	1.383	1,941	4.29
1953 .....	1.447	2,041	4.30
1954 .....	1.344	1,937	4.31
1955 .....	1.422	2,053	4.33
1956 .....	1.521	2,181	4.38



[fol. 123]

Year	Per Capita Consumption (gallons)	Per Capita Real Income (dollars)	Average Price Per Fifth of Distilled Spirits
1957 .....	1.571	2,193	4.42
1958 .....	1.554	2,118	4.42
1959 .....	1.651	2,171	4.42
1960 .....	1.674	2,188	4.56
1961 .....	1.673	2,193	4.56
1962 .....	1.726	2,242	4.51

#### 6. *Pennsylvania Time Series, 1947-1962.*

Series employed: (a) Consumption of distilled spirits per capita 21 years of age and over.

(b) Real personal income per capita.

(c) Average retail price of a fifth of distilled spirits in Pennsylvania package stores.

Term	Statistic	Significance at Five Per Cent Level	Confidence Limits (Three Standard Errors)
$R^2$	0.565	Significant	—
$b_{12.3}$	0.738	Not significant	1.908 to -0.432
$b_{13.2}$	-0.188	Not significant	1.951 to -2.327
$b_{12.3}^*$	0.862	Not significant	2.230 to -0.506
$b_{13.2}^*$	-0.122	Not significant	1.246 to -1.490

\* b (partial regression coefficient) in standard units.

Estimating equation:

$$\log Y_c = -2.1378 + 0.7380 \log X_1 - 0.1878 \log X_2$$

## APPENDIX C

## Control State Analysis, 1960

A description of the statistical data used for the Control State multiple correlation analysis follows:

1. *Consumption of distilled spirits.* These data were taken from the Distilled Spirits Institute which are based on the total population for 1960.

2. *Income.* Medium family income as reported by the Bureau of the Census for 1959 was used.

3. *Prices.* The prices for nine representative distilled spirits as reported for the Control States as of January, 1960 in *The Liquor Handbook, 1960* were averaged. This average was employed as representative of the relative price levels of the control states for the price series.

4. *Correlation technique.* The least squares method applied to the logarithms of the original data were employed for this problem. IBM Multiple Regression Package 6.0.043 was utilized.

State	1959 Median Income	January 1960 Price (per fifth)	Apparent Consumption Per Capita (Wine gallons)
Alabama .....	\$2,683	\$5.21	0.62
Idaho .....	3,841	5.11	0.86
Iowa .....	3,700	4.62	0.75
Maine .....	3,265	4.72	1.31
Michigan .....	4,848	4.78	1.14
Montana .....	3,906	5.24	1.16
New Hampshire .....	3,837	4.33	2.36
North Carolina .....	2,538	4.53	0.91
Ohio .....	4,767	4.71	1.14
Oregon .....	4,436	5.13	1.19
Pennsylvania .....	4,258	5.19	1.05
Utah .....	4,529	5.11	0.78
Vermont .....	3,317	4.52	1.38
Virginia .....	3,250	3.76	1.50
Washington .....	4,626	5.40	1.27
West Virginia .....	3,395	4.83	0.85

[fol. 125]

5. *Control State Experience, 1960*

Series employed: (a) Consumption per capita in wine gallons based on total population reported by Distilled Spirits Institute (1960)

(b) Median family income (Bureau of the Census.)

(c) Average retail price of a fifth of nine different distilled spirits for January 1960, reported in *The Liquor Handbook*, 1960, p.

<u>Term</u>	<u>Statistic</u>	<u>Significance at Five Per Cent Level</u>	<u>Confidence Limits (Three Standard Errors)</u>
$R^2$	0.388	Significant	—
$b_{12.3}$	0.709	Not Significant	1.849 to -0.431
$b_{13.2}$	-2.184	Significant	0.246 to -4.614
$b^1_{12.3}$ *	0.434	Not Significant	1.130 to -0.262
$b^1_{13.2}$ *	-0.623	Significant	1.319 to -0.073

\* b (partial regression coefficient) in standard units.

Estimating equation:

$$\log Y_e = 1.0112 + .7093 \log X_1 - 2.1841 \log X_2$$

EXHIBIT E, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY

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NEW YORK STATE MORELAND COMMISSION  
ON THE  
ALCOHOLIC BEVERAGE CONTROL LAW

---

REPORT AND RECOMMENDATIONS No. 3

Mandatory Resale Price Maintenance

January 21, 1964



230 Park Avenue  
New York 17, N. Y.

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[fol. 127]

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NEW YORK STATE MORELAND COMMISSION  
ON THE  
ALCOHOLIC BEVERAGE CONTROL LAW

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REPORT AND RECOMMENDATIONS No. 3

Mandatory Resale Price Maintenance

January 21, 1964

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To: HON. NELSON A. ROCKEFELLER  
*Governor of the State of New York*

You have directed this Commission to make a "thorough study and reappraisal of the law with respect to the sale and distribution of alcoholic beverages in the State . . . in the light of experience and current social and economic conditions." This Commission is proceeding with its study and reappraisal and is now rendering its third report.

This concludes the recommendations we have planned to submit for possible action for this Session of the Legislature. During the coming year we hope to review the operation of the present law in other respects. Ultimately it may be that consideration can be given to the proper role of the State with respect to the dangers resulting from the excessive consumption of alcohol, rather than the manner in which it is marketed.

LAWRENCE E. WALSH  
*Chairman*

MAURITZ FLEISCHMANN  
WILLIAM C. WARREN  
*Commissioners*

EDWIN L. GASPERINI  
*Counsel*

MIRIAM G. CEDARBAUM  
*First Asst. Counsel*

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## MANDATORY RESALE PRICE MAINTENANCE

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## INTRODUCTION

New York's present system of mandatory resale price maintenance is the only major restriction on the sale of packaged liquors on which this Commission has not yet filed its final recommendations. Section 101-c of the present law requires the fixing of minimum consumer resale prices by the brand owner and the enforcement of these privately fixed prices by the State Liquor Authority (SLA).

On the basis of our study and investigation, we have reached the firm conviction that New York's present system of mandatory resale price maintenance should be abandoned.

We are aware that repeal of this section will result in far-reaching readjustments in the liquor industry at all levels. We propose to minimize undesirable effects by having the repeal of this section take effect after a reasonable transition period during which the industry will have an opportunity to adjust to the proposed change in an orderly manner.

Our reasons for proposing that mandatory price controls be eliminated are as follows:

1. New York consumers are compelled to pay unnecessarily high prices for packaged liquor;
2. Competition is stifled and economic waste and inefficiency encouraged; and
3. Neither temperance nor respect for law is promoted by the artificially maintained high prices that sacrifice the interest of the consumer to the benefit of the liquor industry.

Before turning to the evidence on which these conclusions are based, we should like to emphasize the precise and peculiar nature of the State's present liquor price system. Section 101-c of the ABC Law *requires* the owner of every brand of liquor or wine (except retailers' private labels) sold in the State to file a schedule fixing the minimum consumer resale price for every size bottle of each brand he owns; and prohibits package store licensees from selling any liquor

[fol. 131]

or wine at a price less than the minimum consumer resale price filed by the brand owner.<sup>1</sup> The SLA has no power to pass on the reasonableness of the minimum consumer price. Nor is the interest of the consumer represented by any private or public agency in the fixing of the minimum consumer price for packaged liquor. The role of the SLA under the law is the subservient one of enforcing the prices fixed by the distillers by suspending, cancelling or revoking the license of a retailer who sells at a lower price.

We are satisfied that there is no need to fix the prices of packaged liquor in New York. However, even if such a need could be shown, we would reject the proposition that state-enforced price decisions so important to the community at large should be turned over to a small private group with such a large direct financial self-interest.

1. "Private labels" are specifically excepted by subdivision 3(d) of Section 101-c: "Provided, however, nothing contained herein shall require any manufacturer or wholesaler to file a schedule of minimum consumer resale prices for any brand of liquor or wine offered for sale or sold (1) to a retailer under a brand which is owned exclusively by such retailer and sold within the state exclusively by such retailer; . . ."

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## I. PRICE CONTROL AND THE CONSUMER

For almost every fifth of whiskey that he buys, the New York consumer pays from 50 cents to \$1.50 more than the price at which it is available in at least seven freer price markets. The excess cost is even greater than \$1.50 in many instances, and more than \$2.00 in some. These facts are clearly demonstrated by the following Chart 1, which shows the price per fifth to the New York consumer of 18 leading national brands as compared with the price which consumers pay at high volume retail stores in the District of Columbia, Houston, St. Louis, Dallas, Miami, Chicago, and Omaha.<sup>2</sup>

The District of Columbia, Texas, Nebraska and Missouri are jurisdictions which do not have statutes authorizing resale price maintenance or any other restraint on price competition.<sup>3</sup> Florida and Illinois have laws which, while permitting the brand owners to set prices, leaves the enforcement of these prices to private litigation to be conducted by the brand owners.<sup>4</sup>

The differences in excise taxes in these jurisdictions do not explain the major price differences. For example, Seagram 7 Crown sells for \$3.49 per fifth in Washington, D. C.; \$3.79 in St. Louis; \$4.29 in Chicago; \$3.89 in Miami; \$4.49 in Dallas; \$3.65 in Houston; \$4.45 in Omaha; and \$4.99 in New York. In every case New York's price is at least 50 cents higher. Taxes in Miami are actually 5 cents more per bottle than they are in New York, yet the Miami consumer can pay \$1.10 less. Taxes in Missouri, the jurisdiction in the group with the lowest tax, are only 21 cents less per bottle than New York taxes, yet the consumer pays \$1.20 less. Except for Old Taylor in Omaha, New York's price per fifth for each of 18 leading brands is higher by a larger amount than the difference in the excise taxes.

2. In free markets it is unlikely that there will be a uniform price. The prices listed for free market areas are those freely quoted by large volume retailers. Retailers furnishing extra services and retailers in outlying or particularly favored locations will usually have higher prices.
3. See Appendix B.
4. *Ibid.*

## CHART 1

Retail Prices of the Nation's 18 Leading Brands of Whiskey  
Which Are Marketed in New York

Brands All Fills	Wash., D.C.	Houston, Tex.	St. Louis, Mo.	Miami, Fla.	Chicago, Ill.	Omaha, Nebr.	Dallas, Tex.	New York	State Excise Taxes (Per Fifth)
Seagram 7 Crown .....	\$3.49	\$3.65	\$3.79	\$3.89	\$4.29	\$4.45	\$4.49	\$4.99	Mo. .... \$ .24
Seagram V.O. ....	4.99	5.15	5.29	5.69	6.10	5.49	5.99	6.65	Wash., D.C. .. \$ .30
Canadian Club .....	4.99	5.15	5.29	5.69	5.09	5.49	5.99	6.55	Ill. .... \$ .31
Old Crow .....	3.39	3.65	3.88	3.99	3.79	4.50	4.59	5.45	Neb. .... \$ .32
Imperial .....	3.18	3.37	3.39	3.69	3.29	3.95	3.79	4.50	Tex. .... \$ .34
Jim Beam .....	3.49	3.65	3.88	3.99	3.79	4.25	4.59	5.10	N. Y. .... \$ .45
Calvert Reserve (Extra) * .....	3.49	3.65*	3.88*	3.89*	3.69*	4.50	4.49*	4.99*	Fla. .... \$ .50
Schenley Reserve .....	3.49	3.68	3.79	3.79	3.59	4.50	4.39	4.99	
Early Times .....	3.79	3.65	3.88	4.49	3.98	4.50	4.59	5.45	
Ancient Age .....	3.59	3.65	3.88	3.99	3.79	4.65	4.59	5.95	
Corby's Reserve .....	2.99	3.39	3.33	3.39	2.99	3.95		4.49	
Fleischmann Preferred .....	3.18		3.49	3.79	3.49	4.29	4.49	4.55	
Ten High .....	3.18	3.39	3.39	3.59	3.19	4.10	3.89	4.50	
Old Taylor .....	4.29	4.19	4.39	4.39	4.39	5.95	4.99	5.95	
Cutty Sark .....	5.59	6.27	6.19	6.19	5.89	6.79	6.95	7.11	
Four Roses .....	3.69	3.65	3.99	3.88	3.79	4.50	4.59	5.19	
J & B .....	5.95	6.27	5.99	6.39	5.98	5.90	6.98	7.09	
Kentucky Gentleman .....	3.39			3.59	3.49		4.59	4.79	

Source: Information for areas other than New York supplied to the Moreland Commission by large volume liquor stores.

Note: *Beverage Media*, December 1963, lists two additional brands among the nation's leading twenty. Those two are omitted here because they are not marketed in New York in fifths.

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Chart 2 shows that, even after eliminating the 15 cent difference in excise taxes, the New York prices per fifth for 14 of the 18 brands listed are over 35% higher than the prices at which they are available in Washington.

## CHART 2

Comparative Retail Prices for Fifths of Whiskey  
New York and Washington, D. C.

Brands	Washington, D. C.	New York	Excess†	% New York Over Washington, D. C.
Seagram 7 Crown .....	\$3.49	\$4.99	\$1.35	38.7%
Seagram V.O. ....	4.99	6.65	1.51	30.3%
Canadian Club .....	4.99	6.55	1.41	28.3%
Old Crow 86° .....	3.39	5.45	1.91	56.3%
Imperial .....	3.18	4.50	1.17	36.8%
Jim Beam .....	3.49	5.10	1.46	41.8%
Calvert Reserve (Extra)*	3.49	4.99*	1.35	38.7%
Schenley Reserve .....	3.49	4.99	1.35	38.7%
Early Times .....	3.79	5.45	1.41	37.2%
Ancient Age .....	3.59	5.95	2.01	56.0%
Corby's Reserve .....	2.99	4.49	1.35	45.1%
Fleishmann Preferred ....	3.18	4.55	1.22	38.4%
Ten-High .....	3.18	4.50	1.17	36.8%
Old Taylor .....	4.29	5.95	1.51	35.2%
Cutty Sark .....	5.59	7.11	1.37	24.5%
Four Roses .....	3.69	5.19	1.35	36.6%
J & B .....	5.95	7.09	.99	16.6%
Kentucky Gentleman .....	3.39	4.79	1.25	36.8%

† Excess reduced by 15-cent difference in excise taxes.

Although there are unquestionably some differences in retail operating costs, as between particular cities in New York State and the cities with which New York prices are compared, even these differences do not account for the higher prices that we have found.<sup>5</sup> This may be seen from the fact that New York *wholesale* prices for pack-

5. Testimony of Professor Harold L. Wattel, Public Hearings of the New York State Moreland Commission on the Alcoholic Beverage Control Law, 645-46 (1963). Hereafter all references to the Public Hearings will be made by giving the name of the witness followed by the appropriate page number.

[fol. 135]

aged whiskey are so high that New York retailers actually pay higher purchase prices in many instances than ultimate consumers pay for the same products in other areas. For example, Chart 3 shows that Old Crow 86 proof costs the New York retailer \$4.10 per fifth, while consumers in Washington, Miami, and Chicago pay only \$3.39, \$3.99 and \$3.79, respectively, per fifth. Imperial, Ancient Age, Corby's Reserve, Old Taylor, Four Roses and Kentucky Gentleman are all more expensive to the New York retailer than to consumers in Washington, Miami and Chicago. Eight of the other brands listed in Chart 3 are cheaper to consumers in at least one of the three listed cities than they are to New York retailers.

### CHART 3

#### Prices of Whiskey per Fifth

Brands	Price N. Y. Wholesale 1/12 of Case Price	CONSUMER PRICES			
		Washington, D. C.	Miami, Fla.	Chicago, Ill.	New York
Seagram—7 Crown .....	\$3.77	\$3.49	\$3.89	\$4.29	\$4.99
Seagram—V. O. ....	5.01	4.99	5.69	6.10	6.65
Canadian Club .....	4.94	4.99	5.69	5.09	6.55
Old Crow 86° .....	4.10	3.39	3.99	3.79	5.45
Imperial .....	3.41	3.18	3.69	3.29	4.50
Jim Beam .....	3.83	3.49	3.99	3.79	5.10
Calvert Reserve (Extra)*	3.77*	3.49	3.89*	3.69*	4.99*
Schenley Reserve .....	3.77	3.49	3.79	3.59	4.99
Early Times .....	4.11	3.79	4.49	3.98	5.45
Ancient Age .....	4.51	3.59	3.99	3.79	5.95
Corby's Reserve .....	3.40	2.99	3.39	2.99	4.49
Fleischmann Preferred ...	3.44	3.18	3.79	3.49	4.55
Ten High .....	3.41	3.18	3.59	3.19	4.50
Old Taylor 86° .....	4.51	4.29	4.39	4.39	5.95
Cutty Sark .....	5.25	5.59	6.19	5.89	7.11
Four Roses .....	3.91	3.69	3.88	3.79	5.19
J & B .....	5.33	5.95	6.39	5.98	7.09
Kentucky Gentleman ....	3.61	3.39	3.59	3.49	4.79

Labor costs to the retailer are slightly higher in New York City than in some other jurisdictions as may be seen from Chart 4, but the widest spread, which exists between New York City and Omaha,

[fol. 136]

Nebraska, the listed jurisdiction with the lowest cost, is only \$27.34 and the average difference is only about \$10.00. Further, if New York State as a whole, rather than New York City, is considered, the average spread is even smaller.

#### CHART 4

##### Average Weekly Earnings for Full-time Retail Liquor Employees

<u>Area</u>	<u>Amount</u>	<u>Number of Stores</u>
District of Columbia .....	\$73.47	344
Miami, Florida .....	52.41	138
Chicago, Illinois .....	65.63	1,010
St. Louis, Missouri .....	68.65	132
Omaha, Nebraska .....	49.71	87
(Greater Metropolitan Area)		
New York City .....	77.05	1,712
New York State .....	69.97	3,357
Dallas, Texas .....	68.38	188
Houston, Texas .....	52.98	223

Based on 1958 Census of Business, Volume 2, Retail Trade Area Statistics.

On nationally advertised liquor, obviously, there is no difference in the quality of the product. Nor have we been able to find area-wide variations in service that would account for the major price differences shown on Chart 1.<sup>6</sup> Freight costs from the distillery are insubstantial.<sup>7</sup>

Despite our requests for it, we have received no evidence that the operating expenses of New York wholesalers and retailers account for the substantially higher consumer prices in New York.<sup>8</sup>

6. Professor Alfred Kahn, 1399; Wattel, 657.

7. See Morris Alprin, Counsel to the Greater New York Wholesale Liquor Dealers Ass'n., Inc., 814-15.

8. A survey of upstate wholesalers, submitted to the Commission by Jack Goodman, counsel for the New York State Wholesale Liquor Association, Inc., shows that the "average upstate wholesale establishment does approximately four million dollars volume", and that based on returns from 30 of these establishments they had an average total operating expense of 11.4 per cent of annual sales. The 1962 Annual Operations Survey of Wine and Spirits Wholesalers, prepared by the School of Commerce and Finance of St. Louis University covering a group of reporting liquor wholesalers across the country, and which was also submitted by Mr. Goodman, shows that the national average total operating expenses of liquor wholesalers with comparable volume is 10.1 per cent of annual sales.



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We are convinced that mandatory price control is a major cause of the high prices which New Yorkers pay for packaged liquor.<sup>9</sup>

Even private labels in New York, because they compete with artificially price-propped national brands, cost the New York consumer more than similar private-label products in freer markets.<sup>10</sup>

We have been told by economic experts that if the present system of mandatory resale price maintenance were removed, liquor prices in New York would drop about \$1.00 a fifth.<sup>11</sup> On the basis of total sales of liquor in this State for the year 1962, the repeal of mandatory resale price maintenance would save New York consumers \$150 million a year.<sup>12</sup>

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9. See Wattel, 645-646; Kahn, 1399.

10. Moreland Commission Study Paper No. 5, p. 37, Wattel, 647.

11. See, *e.g.*, Wattel, 647-648, Kahn, 1400.

12. Wattel, 648.

## II. SACRIFICE OF THE EFFICIENCY OF COMPETITION

It is an accepted economic principle that when profit margins are protected, as they are under mandatory resale price maintenance, inefficient businessmen are shielded from the competition of efficient and aggressive businessmen.<sup>13</sup> Because the inefficient are able to make a profit with the aid of mandatory resale price maintenance, no pressure is exerted on them to seek to become more efficient in their present industry or to seek to transfer their resources to an industry where they could be used efficiently and more productively. Where a free market exists, it supplies the needed pressure on the inefficient and inept.<sup>14</sup>

Further economic waste occurs under mandatory resale price maintenance in that consumers frequently must buy services they neither need nor want.<sup>15</sup> Dr. Simon Rottenberg, Dean of the School of Business Administration of the State University of New York in Buffalo, testified:<sup>16</sup>

"Some people want to buy liquor pure and simple. Some people want to buy a package which consists of liquor and, let us say, delivery services or a certain quantum of delivery services. People have different tastes. If, in fact, there were diversity of prices, those that wanted to buy their services with the liquor could do so at a higher price. Those that wanted to buy the liquor pure and simple without the services could do so at a lower price.

"Uniform prices do not permit the consumer himself to have this option. In a sense it is wasteful. It is wasteful in the sense that it does not permit consumers to maximize their satisfaction by offering a large number of options to them."

Ordinarily the consumer who neither wants nor needs expensive personal service may select a store which does not provide such service but offers prices that reflect the consequent reduction in its overhead. A woman buying a dress has the choice of paying a higher price for personal attention on Fifth Avenue or a lower price by waiting on herself at Union Square. When a New York con-

13. Moreland Commission Study Paper No. 5, p. 23-24; Kahn, 1404-05.

14. Wattel, 648-49; Professor Simon Rottenberg, 1224-25; Kahn, 1404-05; David L. Yunich, 851.

15. Yunich, 866.

16. Rottenberg, 1225.

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sumer buys a bottle of whiskey, he is deprived of a comparable opportunity for savings. For, when he buys whiskey, the New York consumer is prohibited from receiving the benefit of a lower price which reflects the merchandising efficiency of the store he chooses.

Compulsory resale price maintenance is at war with the American system of free competition. In his consumer message submitted to Congress in 1962, President John F. Kennedy listed as the third right of the consumer—the “right to choose—to be assured, wherever possible, access to a variety of products and services at competitive prices.”<sup>17</sup> This right is defeated by resale price maintenance.

17. 108 Cong. Rec. 4168, H. Doc. No. 364, 87th Cong., 2d Sess., March 15, 1962.

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### III. ARTIFICIALLY MAINTAINED PRICES AND TEMPERANCE

Professedly, the ABC Law was enacted "for the purpose of fostering and promoting temperance" in the consumption of alcoholic beverages "and respect for and obedience to law." The price-fixing provision, Section 101-c, reavows this purpose and the intent to "eliminate price wars which unduly stimulate the sale and consumption of liquor and wine, disrupt the orderly sale and distribution thereof, and tend to destroy the statutory plan for location of off-premises liquor and wine stores in neighborhood communities which most effectively serves public convenience and advantage."<sup>18</sup>

We are convinced that \$1.00 a bottle is too high a price for New Yorkers to pay for a system based on such unproved assumptions about the relationship between the price of liquor and the amount consumed.

Over ten years before the passage of Section 101-c, prior to World War II, there were some "price wars" in New York City. They had long subsided when this law was enacted.

As far as can be determined, there were very few business failures among liquor retailers and none that can be shown to be the direct result of price-cutting.<sup>19</sup> As to the effect of the pre-war price-

18. We have explained in our Report and Recommendations No. 1 that the "statutory plan for location of off-premises liquor and wine stores in neighborhood communities" has outlived its usefulness to the consumers of this State.
19. Transcript of interview of William E. Phillips, Chief Executive Officer of the SLA, held at the offices of the Moreland Commission on October 22, 1963, p. 37. The absence of significant deviation in the number of licenses in effect during the years may also indicate that the price wars were not driving people out of business.

#### SLA ANNUAL REPORT, 1945

	<u>Package Stores</u>	<u>Restaurants</u>	<u>Hotels</u>	<u>Clobs</u>
1936 .....	1,814	12,079	1,902	661
1937 .....	1,845	12,755	2,074	694
1938 .....	1,859	12,737	2,088	730
1939 .....	1,882	13,089	2,111	742
1940 .....	1,892	13,346	2,123	746
1941 .....	2,395	13,691	2,155	770
1942 .....	2,380	13,368	2,025	780

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cutting on temperance in consumption and drinking behavior, the Annual Report of the SLA for 1940 stated:

"An unstable market, such as existed in New York City, tends to increase the purchases of alcoholic beverages beyond the immediate needs of the consumer. *This should not be considered as an indication of increased consumption.* While the statement on page 47 indicated that 1,481,163 gallons more of liquor were sold in 1940 than in 1939, most of this increase can be attributed to the general improvement in business conditions throughout the nation. Liquor sales throughout the nation for 1940, based on beverage tax receipts, which at the most indicate only apparent consumption for the year, increased 7.7%. The increase in gallonage for New York State was 10.8% over 1939. While the conditions in the New York City market contributed to increased sales, some of the increase is due to purchases by residents of New Jersey because the New York City store prices were much lower than those quoted by New Jersey stores. This is apparent by the sharp decline in liquor sales figures for New Jersey during the unstable market period.

"Another factor disproving the assumption that increased sales mean increased consumption is reflected in the decline in liquor sales immediately following the unstable price conditions.

"One definite conclusion which can be drawn is that the sharp decline in prices increased consumer purchases, which were stimulated by the impression created by industry members that the reduced prices were temporary. This caused an abnormal bargain seeking demand on the part of many consumers who stocked up with liquors for future consumption.

*There is no evidence that the reduced prices did create any anti-social conditions in New York City, the center of the affected market.*" (Italics added.)

The SLA report also noted that arrests for drunkenness and for crimes committed by drunken persons had in fact *declined* in New York State during 1940 despite the World's Fair, the "unstable market in New York City and increased sales of alcoholic beverages."

This is the extent of the SLA's factual material on the actual effects of price-cutting in New York which this Commission has been able to uncover. We have sought in vain for documentation of the position taken by the SLA in 1945 and again in 1950 when that agency recommended the enactment of mandatory resale price maintenance legislation on the ground that price wars unduly stimulated the sale and con-

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sumption of liquor and wine.<sup>20</sup> This contradiction of the position taken by the SLA in 1940 was the subject of the following testimony by John F. O'Connell, Chairman of the SLA from 1943 to 1955, now Vice President of the Distilled Spirits Institute:<sup>21</sup>

"Q I think in a memorandum supporting the bill in 1945, I believe written by someone in the Authority, I don't know by whom, it was stated that the price wars which occurred prior to World War II had increased consumption and had promoted intemperance in the use of alcoholic beverages.

"A I think there is a theory to that effect. On the other hand, I don't believe you can prove, again, the exact causative relationship between the degree of consumption and intemperance. They don't necessarily follow parallel courses.

"Q There was no real foundation for that statement in the memorandum; it was a theory?

"A It was a theory."

However, regardless of the motivation which led to this change of the SLA's position, the time has come to assess the speculative assumptions relating to "temperance" which underlie mandatory resale price maintenance in light of the data and evidence available today, fourteen years after its imposition.

The industry's argument as stated by Mr. O'Connell is as follows:<sup>22</sup>

"The price wars in New York City, particularly around 1940, gave some indication of what happens to the internal health and ethics of the industry and to its outward order and decency when the law of the jungle becomes the order of the day. They provide case histories involving the flaunting before the public of bargains in liquor by a favored few retailers who seek to drive to the wall the mass of their competitors, mostly small businessmen with limited capital.

"It has been asked whether these occurrences in the aggregate had any demonstrable effect on temperance or whether the action by the State which has prevented repeat performances of this

20. See SLA Memorandum on Legislation, Assembly Bill Intro. 1509—Print S2385, 1945 Session.

21. Transcript of interview held in the offices of the Moreland Commission on October 4, 1963, pp. 130-131.

22. O'Connell, 116-118.



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burlesque has promoted temperance. It is easy to give an affirmative answer but, as has been repeatedly demonstrated by all that has gone before, it is difficult, if not impossible, to prove it. Certainly, no one has been so presumptuous or reckless as to suggest that any price war, anywhere, at any time, did anything to promote temperance, however serious the lack of barometers to measure temperance itself."

This argument reduced to its most meaningful form assumes, as does our present system, that price stability itself, or "an orderly market" regardless of the price level, promotes temperance by discouraging bargains which are believed to stimulate excessive purchases and consumption. The other argument made by advocates of New York's present system of mandatory resale price maintenance is that the artificially high prices created by the system, in and of themselves, promote temperance by making more difficult the purchase and consumption of packaged liquor.

We have undertaken to examine these arguments separately and in combination. From the data available to us, we have concluded that the assumed relationship between the system of mandatory resale price maintenance and the goal of temperance is non-existent. We do not wish it to be inferred that we have reached the opposite conclusion, that is, that free price competition fosters temperance. We conclude only that temperance in the use of distilled spirits is unaffected in any meaningful degree by controls on price.

#### *A. Market Stability*

We have compared the statistics of the "stable market" and the "unstable market" and find no significant difference between them as regards the temperate use of liquor.<sup>23</sup>

We have grouped those states providing for uniform liquor prices (including states with state-owned stores, mandatory resale price maintenance states and mandatory minimum mark-up states) and compared their apparent consumption figures (as measured by

23. See Appendices A and B annexed hereto. The states listed in Appendix B are considered for these purposes to be "unstable" since these states permit price competition. The states listed in Appendix A are considered "stable" because those states enforce a uniform retail price.



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sales) with those states with free trade and privately-enforced "fair trade" arrangements. The comparison shows that no discernible relationship exists between the stability of the liquor market and apparent consumption. While Nevada, an "unstable" state, ranks first, and Florida, also an "unstable" state, sixth, in per capita consumption of distilled spirits, the states ranking second through fifth, and seventh through ninth, are all "stable" mandatory resale price maintenance states. The other "unstable" states rank as follows in per capita apparent consumption: Maryland—10th; Illinois—11th; Colorado—13th; Louisiana—14th; Wisconsin—17th; Wyoming—18th; Nebraska—23rd; Missouri—24th; South Dakota—26th; Arizona—28th; North Dakota—30th; South Carolina—31st; Texas—39th and Oklahoma—40th.<sup>24</sup>

Of note is the fact that the average per capita apparent consumption of all of the "unstable" states was 2.02 gallons or only .03 gallons (less than 4 ounces of liquor a year) more than the national average of 1.99.<sup>25</sup>

Not only do the per capita apparent consumption data reflect the absence of a relationship between the "stability" of a market and temperance, but also the available information on rates of alcoholism leads to this same conclusion.

Of the 10 states which have the highest rate of alcoholism in proportion to adult population,<sup>26</sup> six—New Jersey, California, Connecticut, New York, Delaware and Massachusetts—have mandatory resale price maintenance. On the other hand, the free trade states of Missouri, Nebraska and Texas rank 7th, 30th, and 34th, respectively. The other price "unstable" states are spread out and form no consistent pattern with Nevada ranking first, Illinois—6th; Wisconsin—8th; Colorado—16th; Maryland—17th; Louisiana—19th; Florida—23rd; North Dakota—24th; Arizona—29th; South Carolina—36th; South Dakota—38th; Wyoming—43rd and Oklahoma—44th.

24. Moreland Commission Study Paper No. 1, Table 1, p. 12. It should be noted that Washington, D. C. and Alaska, both of which allow price competition and appear to rank high in per capita consumption, were omitted, as was Hawaii which has mandatory resale price maintenance.

25. *Ibid.*

26. Moreland Commission Study Paper No. 1, Table 10, p. 33. Again, Washington, D. C., which has no liquor price controls, was not included in this study. Alaska and Hawaii were also omitted.

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Another way to attempt to measure temperance in different places is to compare the rates of first mental hospital admissions for alcohol problems. Our comparison of these data in "stable" states and "unstable" states leads us again to conclude that no relationship exists between price "stability" and temperance. The rankings of the "unstable" states<sup>27</sup> are as follows: North Dakota—1st; Nevada—4th; Illinois—9th; South Dakota—10th; Maryland—11th; Nebraska—15th; Wisconsin—17th; Wyoming—18th; Colorado—26th; South Carolina—27th; Louisiana—29th; Texas—32nd; Arizona—37th; Missouri—40th and Florida—43rd.

After reviewing the available data which measure both aspects of temperance—the amount of liquor consumed and the problems associated with excessive consumption—we are unable to conclude that uniformity (which the industry calls "stability") or lack of uniformity in liquor prices contributes to temperance in the use of liquor. And our conclusion has been confirmed by those who are expert in the field of problems of alcohol. Dr. Selden D. Bacon, Director of the Rutgers University Center of Alcohol Studies, in Commission Study Paper No. 1, concluded that:<sup>28</sup>

"The present New York Alcoholic Beverage Control Law and the control system set up thereunder has had no demonstrable effect on the direct problems of alcohol or on the rate of consumption of alcoholic beverages.

. . . . .

"An analysis of the figures on arrests for driving while intoxicated and for rates of alcoholism in the various communities studied, reinforces a conclusion that laws dealing with sales, sellers and selling are above all irrelevant to the solution of the major problems of alcohol.

. . . . .

"The most crucial variable in determining whether or not a defined area will have a high or low rate of alcoholism appears to be the level of industrialization prevailing in the area. Industrialized areas have higher alcoholism rates than rural and agrarian areas . . ."

27. Moreland Commission Study Paper No. 1, Table 18, p. 48. Excluded were Alaska, Washington, D. C. and Oklahoma, all "unstable" states, and Hawaii and Massachusetts, "stable" states.

28. pp. 54, 57.

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*B. High Prices*

The argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it is also unfounded. Not only does this blunderbuss approach miss its target—for obviously those who are alcohol addicts will acquire it at any price—but also the assumption that most liquor buyers are price conscious is unsupported in fact. Indeed, when the latter thesis is advanced by the industry, it has a distinctly tongue-in-cheek quality. The industry is motivated not by a desire to reduce its market, but by a desire to expand business activity. It does not oppose, but enthusiastically endorses, tax reductions to reduce prices. Certainly the tremendous expenditures for national and local liquor advertising are not intended to reduce consumption or encourage temperance.

To test the thesis that high prices promote temperance, our staff has collected current retail prices for leading brands of whiskey in every state in the union except Alaska, Hawaii and South Carolina.<sup>29</sup> On the basis of these prices, we have compared the per capita apparent consumption data for "low" price and "high" price states.

We divided the various states into two groups by comparing their retail prices with the New York prices of the 18 leading national brands of whiskey shown on Chart 1.

The basis of division was as follows:

*Low*—all states in which the majority of the prices of these brands are 50 cents or more under the New York prices.<sup>30</sup>

*High*—all states in which the prices of the majority of these brands are less than 50 cents below or are higher than the New York prices.

The states falling into the "low" price group are Missouri, Nebraska, Texas, Florida, Illinois, Louisiana, Maryland, Wisconsin, Iowa, Maine, Michigan, New Hampshire, North Carolina, Ohio, Vermont, Virginia and West Virginia. All the others are in the "high"

29. A chart of these prices is annexed as Appendix D. The State of Mississippi, which has prohibition, is also excluded.

30. The prices of several of the 18 brands are 50 cents or more lower than the New York prices in some of the "high" states as well.

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price group. In the ranking of states by per capita sales for the year 1962, the "low" price states included in the study rank as follows:<sup>31</sup>

Rank	Highest Quarter (12 states)	Rank	2nd Quarter (12 states)
2	New Hampshire	14	Louisiana
6	Florida	16	Virginia
10	Maryland	17	Wisconsin
11	Illinois	19	Maine
12	Vermont	23	Nebraska
		24	Missouri
Rank	3rd Quarter (12 states)	Rank	Lowest Quarter (11 states)
27	Michigan	39	Texas
29	Ohio	41	West Virginia
35	North Carolina	44	Iowa

We can discern no relationship between consumption patterns in the "low" and "high" price states. It should be noted that, while eight of the "low" price states shown above have per capita sales above the national average of 1.99 gallons, the other nine states are below that average.<sup>32</sup> If an allowance were made for out-of-state business attracted by low prices, an even larger proportion of the "low" price states would undoubtedly be below the national average.

If we look at annual arrests for drunkenness listed in Table 9 of Commission Study Paper No. 1, we see that the arrests involving drunkenness as a percent of all arrests exclusive of traffic violations<sup>33</sup> are much the same in the "high" price states as in the "low". In "low" price Richmond, Virginia, and Charlotte, North Carolina, the ratios are 54.9% and 55.5%, respectively. In "high" price New Brunswick, New Jersey, Jersey City, New Jersey, White Plains, New York, Rochester, New York, and Harrisburg, Pennsylvania, the respective percentages are 42.7%, 35.6%, 65.2%, 73.3% and 53.6%. No differentiation based upon the price of liquor alone is discernible.

In the ranking of states by rate of alcoholism, the "low" price states are spread throughout the listing and no pattern is noticeable. Of the "low" price states, Illinois, Missouri, Wisconsin and Michigan are in the top 12 states in rate of alcoholism; Ohio, Maine, Maryland, Vermont, Louisiana, New Hampshire and Florida are in the next 12; West Virginia, Texas and Iowa are in the third 12; and Virginia and North Carolina are in the bottom 12.<sup>34</sup>

31. Moreland Commission Study Paper No. 1, p. 12. Excluded are Washington; D. C., Alaska, Hawaii and Mississippi.

32. *Ibid.*

33. *Id.* at p. 26.

34. *Id.* at p. 33.

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In arrests for "driving while intoxicated," again no pattern is discernible. Missouri is 5th, North Carolina 6th, Louisiana 10th, West Virginia 12th, Florida 16th, Virginia 17th, Nebraska 21st, Vermont 23rd, Texas 25th, Ohio 31st, Iowa 32nd, New Hampshire 33rd, Michigan 34th and Wisconsin 36th.<sup>35</sup>

Finally, in rate of "alcohol first mental hospital admissions", only Illinois, Maryland and West Virginia of the "low" price states are among the top twelve, while Nebraska, Wisconsin, New Hampshire, North Carolina and Virginia are among the second twelve; Vermont, Ohio, Louisiana, Maine, Texas and Iowa are among the third twelve; and Missouri, Florida and Michigan are in the last quarter.<sup>36</sup>

We conclude that artificially high prices for liquor have no substantial relationship to temperance. They serve merely to insure the profit margins of the various segments of the industry.

We have also tried to ascertain whether "high" prices and "stable" prices when combined have any effect on drinking patterns. We cannot conclude that these elements, even when taken together, promote temperance or are related to temperance.

Thus, Florida, Illinois, Louisiana, Wisconsin, Missouri, Nebraska, Maryland and Texas have both "low" prices and "unstable" markets. Yet, their combined average per capita consumption amounts to 2.17 gallons, or 0.18 gallons (approximately 13 ounces per person per year) more than the national average of 1.99 gallons. And New York, Connecticut, New Jersey, Delaware, California, and Massachusetts, all of which have prices which are both high and uniform, have higher average per capita consumption.<sup>37</sup> And although in rate of alcoholism Illinois ranks 6th, Missouri 7th, Wisconsin 8th, Maryland 17th, Louisiana 19th, Florida 23rd, Nebraska 30th, and Texas 34th, they are overshadowed by California, Rhode Island, Massachusetts and New York, which rank 2nd through 5th, and Connecticut and New Jersey, which rank 9th and 10th, and which have mandatory resale price maintenance or in other words, a combination of both "high" prices and "orderly" markets.<sup>38</sup>

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35. *Id.* at p. 37.

36. *Id.* at p. 48.

37. *Id.* at p. 12.

38. *Id.* at p. 33.

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In arrests for "driving while intoxicated", the six "low" and "unstable" states as to which we have information—Florida, Missouri, Louisiana, Texas, Wisconsin and Nebraska—rank 16th, 5th, 10th, 25th, 36th, and 21st.<sup>39</sup> And in rate of "alcohol first mental hospital admissions", Illinois ranks 9th, Maryland 11th, Nebraska 15th, Wisconsin 17th, Louisiana 28th, Texas 32nd, Missouri 40th, and Florida 43rd.<sup>40</sup>

We also decided that an expert appraisal of the available statistics on the relationship between price and demand for liquor would be useful. Accordingly, we commissioned Professor Harold L. Wattel, Chairman of the Division of Business of Hofstra University, to conduct such a study. His principal conclusion was as follows:<sup>41</sup>

"The history of the industry suggests that consumption patterns do not change radically and that the demand curve is for the most part price inelastic. A ten percent decrease in price will be followed by an increase in sales of less than ten percent."

Professor Wattel's views on the price inelasticity of liquor are supported by studies performed by others in other states. Thus in Chapter XXI of the 1963 Report of the Illinois Commission on Revenue, which relates to the Alcoholic Beverage Tax in Illinois, Karl B. Marx, Assistant Professor of Social Sciences at Western University, concluded that "the evidence available does not appear to support this, or any other claim with respect to price elasticity of demand for distilled spirits."<sup>42</sup>

Only one industry economist came forward at our public hearings to testify with respect to mandatory resale price maintenance. Professor Robert E. Weintraub, Sub-chairman of the Department of Economics at the Bernard M. Baruch School of Business of the City University of New York, testified on this subject on behalf of Licensed Beverage Industries, Inc., a distiller's trade association, and on behalf of the New York State Wholesale Liquor Association, Inc., a trade association of upstate wholesalers. He confirmed Professor Wattel's study and conclusions. Professor Weintraub testified as follows:<sup>43</sup>

39. *Id.* at p. 37.

40. *Id.* at p. 48.

41. Moreland Commission Study Paper No. 5, p. 54.

42. p. 733. For Professor Marx's full statement on this subject, see Appendix C, annexed to this report.

43. Weintraub, 1551-52, 1559-60.



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"Therefore one cannot forecast with any great degree of certainty the effect of a change in price and income on distilled spirits expenditures and consumption on the basis of correlation analyses. The history of the industry suggests that consumption patterns do not change radically and that the demand curve is, for the most part, price inelastic. A ten percent decrease in price will be followed by an increase in sales of less than ten percent."

. . . . .

"What does it mean? It means that a dollar fall in price, such as Dr. Wattel believes will occur, if resale price maintenance is abandoned, and in percentage terms that amounts to about a 22 per cent cut in price, on a figure of 4.60, which he uses on page 58, will lead to a 22 per cent rise in consumption per capita."

In weighing this testimony, we believe that the essential fact to bear in mind is that all of the statistics analyzed relate to *sales* rather than consumption, for the obvious reason that no figures on actual consumption are in existence or can be obtained. The importance of this distinction was clearly described by Professor Wattel in pointing out that an increase in liquor sales does not necessarily mean an increase in consumption."

"First of all, I think consumers in our neighboring states would find the price differential very attractive, and especially to those people who commute to work in New York City, or New York State, from out of state, they would tend to purchase their distilled spirits here, as against in their home states.

"So there would be an increase in sales from that quarter.

"Secondly, there are people in New York State who now purchase their distilled spirits in other less costly markets, such as Washington, D. C., and New Hampshire, et cetera.

"I think if the prices were more attractive in New York State, that these consumers would do their purchasing here, instead of out of state. That is the second area from which the increase of sales would come.

"The third area would be that there would be some increase in consumption. I think that perhaps for wine drinkers now, that distilled spirits prices might become a little more attractive, relative to their income, and there would be some increase there.



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"Actually this may not involve any increase in alcohol intake at all, since we have a difference of proofs and alcohol percentages in these beverages.

"So that I believe, as I said before, that it would have a minimal effect on consumption. Sales, of course, would swell."

Thus, if New York prices of liquor decline below those of our neighboring states, we can expect that a substantial amount of liquor will be sold to residents of those states. The magnitude of the sales that can be expected to be made to out-of-state residents, should New York prices decline, may be indicated by the fact that over 238,000 out-of-state residents are regularly employed in New York State. The New York Metropolitan Area alone has some 211,900 regularly employed out-of-state residents; the Albany-Troy-Schenectady area has some 1,800 out-of-state residents regularly employed there; and the Buffalo Metropolitan Area has 3,100. The other parts of the State have an estimated 21,700 regularly employed out-of-state residents.<sup>45</sup>

Thus, we can expect New York liquor sales to be increased by the liquor purchases of these non-New Yorkers, and it seems very probable that these persons will buy liquor for their families and friends as well.

In sum, all the economics experts agree on the outside limits of any increase in sales which would follow a decline in New York liquor prices. A substantial part of that increase in sales will be the result of new purchasers rather than new drinkers, that is, those persons, New Yorkers and non-New Yorkers, who do not now buy their liquor in New York because of the exorbitant prices. Although we have not had evidence that actual New York liquor consumption will increase as a result of a decrease in liquor prices, neither can we conclude that actual consumption will not increase at all. Our best judgment, based on all we have seen, is that actual liquor consumption will not increase to a degree that would be of concern to the State.

We conclude this part of our discussion with three additional observations:

1. As we pointed out in our Report and Recommendations No. 1 (pp. 3-4), consumption of alcoholic beverages in the United States

45. U. S. Census of Population, 1960, Final Report PC (2-6B) "Journey To Work".

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and particularly in New York has grown steadily since Repeal. No one has suggested any particular level of consumption that can be equated to temperance. Therefore, even if the elimination of resale price maintenance should result in a moderate increase in per capita consumption, this would be no reason for retaining this uneconomic and unjustifiable system, since consumption seems destined to continue its increase in the future under any circumstances.

2. We are also aware of the obvious fact that sales and possibly consumption can be temporarily stimulated by give-away or loss-leader type of sales. We think that over any reasonable period of time this phenomenon will not occur with any frequency because of the ordinary profit motives of businessmen. It is important to remember that the only evidence of "penny sales" that the industry could produce at our hearings related to what happened in Washington ten years ago,<sup>46</sup> and there was no evidence that even those brief occurrences resulted in any marked increase in the actual consumption of liquor. If this should ever prove a significant danger, it could, of course, be eliminated by legislation much less drastic than compulsory resale price maintenance.

3. It is obvious that, just as would be the case with any commodity, a *very* high price would make drinking economically impossible for lower income groups, and lessen the consumption of others. We do not consider this a proper objective of governmental control. It is particularly objectionable when it is achieved by means of a system of artificially high prices fixed by the industry for its own benefit and enforced by state action.

46. Hilliard Schulberg, Executive Director, Washington, D. C., Retail Liquor Dealers Assn., pp. 992-94.

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#### IV. ARTIFICIALLY MAINTAINED PRICES AND RESPECT FOR LAW

Industry witnesses favoring compulsory resale price maintenance assert that the removal of Section 101-c from the law will result in a significant increase in ABC Law violations by package store owners confronted with failure or marginal survival. They advance the claim that package store licensees commit fewer violations of the law than do other purveyors of alcoholic beverages because they are not subject to the rigors of competition and are assured of a protected margin of profit.<sup>47</sup> They contend that package store owners, for example, are not tempted to make doubtful sales to suspected minors or intoxicated persons. With the removal of the protection of Section 101-c, it is claimed that the prosperity of package stores would end, the value of package store licenses would decline sharply, and that package store owners would grow desperate and become more reckless in resorting to forbidden practices.

We weighed a similar argument by the industry in our consideration of other restrictive provisions of the ABC Law limiting the number and locations of package stores. We there described this argument as something akin to "moral blackmail," which the State could not accept.<sup>48</sup> We adhere to that position and conclude that the continuance of this uneconomic and wasteful system is not necessary or desirable from the standpoint of respect for and obedience to law. The State cannot compel liquor customers to pay a tribute of \$1.00 a bottle to avoid infractions of law by liquor retailers. Strict enforcement by the police and administrative authorities must be the State's answer to threatened illegal sales.

Further, the industry claim that compulsory resale price maintenance is necessary to ensure the legal operation of liquor retailers was supported at our hearings solely by speculative opinions advanced by those most interested in maintaining the present system for their own benefit. It was considerably at variance with other testimony from officials in states having actual experience in the field.

Florida does not have state-enforced retail prices, but permits a brand owner to set a resale price and enforce it by private litigation.

47. Alprin, 793-4; Bloustein, 958.

48. Moreland Commission Report and Recommendations No. 1, January 3, 1964, p. 28.

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Richard B. Keating, Director of the State Beverage Department of that state, testified as follows:<sup>49</sup>

"Q. Going back to the difference between markets where the prices are higher in Florida as opposed to those markets where the prices are lower—have you from your experience discovered any difference in the compliance with the liquor laws in Florida because of the difference in prices in the markets?"

"A. Not any significant difference. Certainly none that I could attribute to the price structure. It seems logical that the person who is in desperate straits financially may be moved to do something that they wouldn't do otherwise.

"But as far as any actual ones, we have very little.

"The one urban market, that is, the Jacksonville market, which we do not have price-cutting—as a matter of fact, we have had some recent indications that that market is not doing too well, so far as the compliance of the law on the sales to minors, for instance."

Frank E. Weakly, Chairman of the Alcoholic Beverage Control Board of the District of Columbia, told us of the results of a recent review of the problem under consideration by another independent group.<sup>50</sup>

"Q. Chairman Weakly, was a citizens committee appointed in July 1962 to conduct a cooperative study of the Alcoholic Beverage Control system in the District of Columbia?"

"A. I think it was appointed earlier than that, but I think it rendered its report in July.

"Q. You are correct. The committee was appointed earlier in the year 1962, and can you tell us what the committee reported in connection with the District of Columbia's system or lack of any resale price maintenance?"

"A. They recommended maintaining the status quo, namely, no controls."

Before concluding our discussion of the relationship between resale price maintenance and respect for the law, we believe that a brief review of the history of Section 101(c) will be instructive. It demonstrates clearly that the enactment resulted not from any disinterested attempt to find a legislative remedy for actual and impor-

49. Keating, 672-73.

50. Weakly, 690-91.

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tant evils, but rather from a concerted and successful effort by the liquor industry to obtain a legally-protected guarantee against supposed evils anticipated at some time in the future.

In 1942, long before the enactment of Section 101-c, the provision mandating resale price maintenance, the Legislature enacted Section 101-b. This section prohibits price discrimination on sales both to wholesalers and retailers. It also requires every brand owner and wholesaler to file with the SLA a monthly schedule of the price at which he sells each brand and size of container of liquor and wine. It was a protection against discriminatory favoritism by wholesalers and distillers, which the SLA described as the principal cause of the New York "price wars".<sup>51</sup> If enforced, it unquestionably would have made an important contribution to maintaining the stability of the retail market.<sup>52</sup> Section 101-b is still a part of our law.

The effectiveness of Section 101-b alone as a deterrent to price wars was never tested. Neither the SLA nor the industry was satisfied with eliminating discrimination and thus fostering stability. War-time shortages had put an end to the price wars. When the end of these shortages was foreseen in 1945, the SLA, before any experience had been gained as to the ability of Section 101-b to forestall price wars, successfully advocated the passage of a law which authorized the SLA, by regulation, to require the imposition of resale price maintenance. The law authorized the SLA:<sup>53</sup>

"To adopt rules and regulations, in its discretion, (a) prohibiting or regulating the sale of alcoholic beverages in violation of the provisions of a fair trade contract entered into pursuant to article twenty-four-a of the General Business Law (Feld-Crawford Fair Trade Law); (b) prohibiting the sale of any or all alcoholic beverages, other than items offered for sale under a brand which is owned exclusively by one retailer and sold within the state by such retailer, except pursuant to a fair trade contract entered into in accordance with the provisions of article twenty-four-a of the General Business Law. Such rules and regulations

51. 1940 Annual Report of the S.L.A., pp. 14-15.

52. See SLA Memorandum on Legislation, note 20, p. 13 *supra*, at p. 2:

"By placing all retailers on an equal purchasing level, drastic reductions of resale price will be eliminated. It is believed that drastic price differentials on the same brand sold by different retailers is the result of special deals given to selected retailers and not made available to others. If all retailers purchased at the same price, the differential in resale price could not be an appreciable one because the retailer would have to stand the entire loss himself without the assistance of the distiller or wholesaler."

53. Chapter 687 of the Laws of 1945, repealed by Section 4 of Chapter 689 of the Laws of 1950.

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should be calculated to foster and promote temperance, and provide for the orderly distribution of alcoholic beverages. For the violation of any rule or regulation duly promulgated under this subdivision, the Authority may suspend, cancel or revoke a license as follows: for a first offense, not exceeding ten days suspension of license; for a second offense, not exceeding thirty days suspension of license; and for a third offense, the Authority may suspend, cancel or revoke the license."

In its memorandum supporting that law, the SLA stated:

"There has recently been some evidence that alcoholic beverages were being sold at prices below the maximum price fixed by the Office of Price Administration. Members of different branches of the industry were of the opinion that this might signify the imminence of a 'price war'.

. . . . .

"This would enable the Liquor Authority to permit brand owners to enter into such contract voluntarily and in connection therewith prohibit any violation of a fair trade contract by any retailer. In the event this voluntary method failed, the Liquor Authority could prevent an incipient 'price war' from spreading by using the alternative method or power to prohibit the sale of any alcoholic beverages except pursuant to a fair trade contract."

Mr. O'Connell, then Chairman of the SLA, told us that at the time he sought this power to enforce distiller-fixed retail prices, there had then been no repetition of the pre-war price wars. They were merely "anticipated".<sup>54</sup>

Despite the absence of price wars and the protection of Section 101-b, which was designed to prevent the very conditions that had caused the price wars (special deals to favored retailers), the SLA proceeded by regulation to exercise its power under the 1945 law. Its regulations became the New York resale price maintenance law. Although subsequently held unconstitutional as a delegation of legislative power, they were validated by enacting them into the statute as present Section 101-c.

The SLA drafted this basic price control pattern under the guidance of the retail package store associations. Oddly enough, in spite of the extensive meetings and discussions held with all elements of the liquor industry from 1944 through 1947, there is no record of

54. Transcript of an interview held in the offices of the Moreland Commission on October 4, 1963, p. 133.



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any meeting of the SLA or its staff with civic interest or social welfare groups, or for that matter any representative of the consuming public.

The true concern of the SLA appears in a staff memorandum prepared at the time for Chairman O'Connell. The full memorandum is set forth in Appendix E. The actual area of industry and regulatory concern appears from the following excerpts.

As to conferences held with the distillers:

"The Distillers' representatives were agreed that price wars are bad for the industry as a whole; that if each distiller or national supplier kept this thought constantly in mind and in effect, there could be no price wars. Whereas these representatives were agreed that a price war was not imminent in the New York area on standard goods, there was some small difference of opinion as to the possibility of a price breakdown on so-called 'distress goods', by specific reference, rums and grain spirit gins. Three of the representatives felt that such price breakdown could happen as a natural consequence of an over supply on these items and the reluctant acceptance by the public, so long as standard goods are available. Another representative felt serious price breakdown on distress goods could be effectively controlled under provisions of the Hollowell Bill.

The Distiller representatives were agreed that

(a) Fair trade is a desirable method of operating in the liquor industry;

(b) That some agency outside the industry should enforce fair trade contracts where such are in effect, either under voluntary or mandatory regulations;

(c) That the enforcement of fair trade contracts properly falls under present State Control."

As to a conference held with package store representatives:

"This conference was called at the request of several of the package store associations, and was attended by twenty representatives, including counsel of the associations listed. During open discussion, the following items were generally agreed upon, and are so indicated in the stenographic record of the meeting.

(1) That price cutting presently is statewide among the known 'price chisellers'.

(2) The price cutting, from 25 cents to 50 cents per bottle, is in effect with these dealers, on standard brands, under Fair Trade contracts, and that such information has been brought repeatedly to the attention of the brand owners, without any effective results.

(3) That such price cutting is practiced by these dealers to effect tie-in sales of off brand merchandise.



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(4) That rums and grain spirit items are being offered at prices slightly above dealers cost.

(5) That price cutting is widespread on standard brands of blended whiskies most generously distributed; that this is a certain indication that a price war will result as soon as stocks return to normalcy.

(6) That these associations, representing, according to their own statements, approximately 90% of the licensed retail liquor dealers, have no confidence in the intention or ability of distillers and other brand owners to avoid price wars or to maintain any discipline among certain known price chisellers, and that under present Fair Trade agreements these dealers, attempting to abide by stipulated prices, are at a severe handicap, and that they unanimously agree that provisions of the amendment to the Alcoholic Beverage Control Law, relating to Fair Trade price regulations, be made mandatory and effective at the earliest possible time."

The memorandum throughout is concerned solely with the economic welfare of the industry. There is not one word of concern for temperance or for law enforcement—or for the consuming public.

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## V. CONCLUSIONS AND RECOMMENDATIONS

### A. *Conclusions*

For all of the foregoing reasons we have concluded that Section 101-c injures the New York consumer in at least three important ways:

1. It causes New Yorkers to pay about \$1.00 a fifth more for liquor than consumers in areas of the country which do not have mandatory resale price maintenance.
2. It eliminates competition and deprives the New York consumer of the benefits of free market efficiency.
3. It places price-fixing power in the exclusive hands of the distillers, the group having the largest self-interest to serve, an extraordinary power which the State should be reluctant to grant any private group, even a disinterested one.

We also find:

1. Compulsory resale price maintenance enforced by the State has no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol.
2. The repeal of this system will not create law enforcement problems with which the State is unable to deal.

### B. *Recommendations*

We make the following recommendations:

1. Section 101-c of the ABC Law, which provides for SLA enforcement of minimum consumer resale prices fixed by the distillers, should be repealed.
2. Although we believe that State enforcement of distiller-fixed consumer prices is completely unjustified, we recognize that its elimination represents a radical change which, when combined with the elimination of the restrictive licensing of package stores, may well have an impact on the industry and especially on some of the small retail package stores. But the interests of the consuming public must be paramount, so that the possible effect on the industry does not support the retention of this unjustified law. This is particularly true since it still will be possible for the distillers, like manufacturers of other branded products, to make private resale price maintenance arrangements under the Feld-Crawford Act.

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In order to avoid too sudden an impact on the industry, however, we recommend that there be a transition period during which the industry will have an opportunity to adjust to the proposed change in an orderly manner. We therefore propose that the repealing act provide for a reasonable period—six months—in which package store owners will be able to dispose of stock on hand at the time of the statutory enactment.

Respectfully submitted,

LAWRENCE E. WALSH  
*Chairman*

MANLY FLEISCHMANN  
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*Commissioners*

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*First Asst. Counsel*

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## APPENDIX A

1. States like New York in which the distiller fixes the minimum consumer resale price entirely on his own.

California. Calif. Bus. & Prof. Code, Div. 9 §24755, added Stat. 1961, Chap. 635, p. 1935 as amended; Calif. Stat. 1963, Chap. 1022.

Delaware. Del. Alcoholic Beverage Control Commission Regs., Rule 39 (1962).

Hawaii. Hawaii Revised Laws, §159-17 (1955); Hawaii Liquor Commission of the City and County of Honolulu Regs., Rule 34 (1955).

Indiana. Ind. Alcoholic Beverage Commission Reg. No. 11 (1953).

Massachusetts. Mass. Gen. Laws, Chap. 138, §§15, 25C (1932), as amended to date.

Minnesota. Minn. Stat., §§340.09, 340.97-340.976 (1957); Minn. Liquor Control Commissioner Regs. 425-4282 (1962).

New Jersey. N. J. Division of Alcohol Beverage Control Reg. No. 30, Rules 1-5 (1957), as amended.

2. States which prescribe minimum mandatory markups for wholesalers and retailers—but do not otherwise enforce minimum consumer resale prices.

Arkansas. Wholesalers, 13%; Retailers, 30%, Ark. Stat. Annot., §48-1204 (1947), with 1961 Supp.

Georgia. Wholesalers, 12%; Retailers, 27%, Ga. Dept. of Revenue, Alcohol Tax and Control Unit Regs., Chap. 7 (1962).<sup>1</sup>

Kansas. Kan. Laws of 1961, Chap. 241.

New Mexico. Wholesalers, 17.5%; Retailers, 38.8%. N. M. Stat. Annot., §46-9-11 (1953).<sup>2</sup>

1. On December 12, 1963, the Director of Revenue of the State of Georgia announced that as of January 1, 1964 Georgia would abandon its minimum markup regulations. Thus, Georgia is the newest member of the "free trade" states. The Director's action was based upon a report made to him by John E. Lewis, an Assistant Professor of Economics at Georgia State College, who concluded that, based upon "most reliable studies," total liquor consumption in Georgia would not increase as a result of lower "legal liquor prices."
2. New Mexico also provides that wholesalers and retailers may not sell in excess of 18.04% and 33¼% of the retail selling price, respectively. N. M. Stat. Annot. §§46-9-5, 46-5-6 (1953).

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3. States which require the distiller or wholesaler to fix minimum consumer prices but also fix a minimum markup for the wholesaler and retailer.

Connecticut. Wholesalers, 11%. Conn. Laws 1963, Public Act No. 268; Conn. Gen. Stat., §30-63 and §30-64 (1958). Retailers, 21½% of the selling price. Conn. Laws 1963, Public Act No. 267.

Kentucky. Wholesalers, 15%; Retailers, 33⅓%. Ky. Rev. Stat., Tit. XX, §244.390 (1960); Ky. Alcoholic Beverage Control Board Regs., A.B.C.-2:12 (1961).

Rhode Island. Wholesalers, 13%; Retailers, 25%. R. I. Liquor Control Admin. Reg. 52, 67 (1947).

Tennessee. Wholesalers, 11½%; Retailers, 27.5%. Tenn. Code Annot., §57-7-1 (1961).

4. States which own and operate liquor stores and set their own prices.

Alabama—Ala. Code, Tit. 29 (1958).

Idaho—Idaho Code, Tit. 23 (1955).

Iowa—Iowa Code, Tit. VI (1962).

Maine—Me. Rev. Stat., Chap. 61 (1954).

Michigan—Mich. Compiled Laws, Chap. 436 (1948).

Montana—Mont. Rev. Code, Tit. 4 (1942).

New Hampshire—N. H. Rev. Stat. Annot., Tit. XIII (1955).

North Carolina—N. C. Gen. Stat. Recompiled, Chap. 18 (1943).

Ohio—Ohio Rev. Code, Tit. XLIII.

Oregon—Ore. Rev. Stat., Tit. 37 (1955).

Pennsylvania—Penn. Laws of 1951, Oct. 21.

Utah—Utah Code Annot., Tit. 32 (1953).

Vermont—Vt. Rev. Stat., Tit. Seven (1959).

Virginia—Va. Code, Tit. 4 (1950).

Washington—Wash. Rev. Code, Tit. 66 (1951).

West Virginia—W. Va. Code, Chap. 60 (1935).

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## APPENDIX B

## 1. States which have general statutes authorizing private resale price maintenance agreements.

Arizona. Ariz. Rev. Stat., §§44-1422 and §44-1423 (1956).

Colorado. Col. Rev. Stat., §§55-1-1, 55-1-4 (1953).

Florida. Fla. Stat. Annot., §§541.03, 541.07 (1962).

Illinois. Ill. Annot. Stat., Chap. 121½ §§188, 189 (1960).

Louisiana. La. Rev. Stat., §51:392 (1950).

Maryland. Md. Annot. Code, Art. 33, §103 (1957).

Nevada. Nev. Rev. Stat., §§599.030, 599.040 (1962).

North Dakota. N. D. Cent. Code, §§51-11-02, 51-11-04 (1960).

Oklahoma. Okla. Stat. Annot., Tit. 78, §§41, 44 (1951).

South Carolina. S. C. Code of Laws, §§66-93, 66-94 (1962).<sup>1</sup>

South Dakota. S. D. Code, §§54.0402, 54.0406 (1939).

Wisconsin. Wis. Stat. Annot., Tit. 14, §133.25 (1957).

Wyoming. Wyo. Stat., §§40-10, 40-14 (1957).

2. Jurisdictions which have free trade.<sup>2</sup>

Alaska

District of Columbia

Missouri

Nebraska

Texas

1. South Carolina prescribes a maximum markup of 25% above cost. S. C. Code of Laws, §4-72 (1962).

2. Georgia is now a free trade state. See note 1, p. 32, *supra*.

## APPENDIX C

## Excerpt from Chapter XXI,

## 1963 Report of the Illinois Commission on Revenue

**ELASTICITY OF DEMAND FOR DISTILLED SPIRITS**—The success of a tax rate increase depends upon the elasticity of demand for the product in question. If the demand for a product is relatively inelastic, as in the case of cigarettes, an increase in the tax rate should result in a considerable increase in state tax revenue. However, if the demand for a product is relatively elastic, a tax rate increase will result in a proportionately larger reduction in sales, and may well result in only a meager increase in state revenue. The producer or distributor of the product may suffer since his sales decline, and he must also absorb a large share of the tax burden.<sup>56</sup>

Several students of liquor taxation have concluded that the demand for this product is relatively inelastic. In 1942, Glenn D. Morrow and Orba F. Traylor assumed that the demand for alcoholic beverages is inelastic when they wrote: "Tax levies within current limitations apparently exercise little influence on consumption of legal alcoholic beverages."<sup>57</sup> In the 1949 Report of the Revenue-Laws Commission, Dr. J. D. Morgan wrote:

"The sections on consumption and elasticity indicate that the demand for alcoholic beverages is quite inelastic . . . It would appear that within any reasonable limit, the state can secure what revenue it wishes from the liquor tax by the simple expedient of making proportionate changes in its tax rates. If Illinois wanted an additional twelve million dollars from distilled

56. It is possible that the producer may not be able to directly shift the tax backwards to the owners of the factors of production in the long run if these factors can shift from the taxed industry to other industries. However, this shift in factors of production will tend to reduce not only the wage rates of the moving factors, but also, because of the increased supply of factors, the wage rates of factors already employed in other industries. To the extent that this is possible some of the tax can be shifted indirectly to the factors of production employed in non-taxed industries. If labor unions in both the taxed industry and the non-taxed industries have considerable monopoly power, unemployment, rather than a general reduction in factor payments, may occur. Under these conditions, it is possible that a disproportionate share of the tax may be shifted to owners of the other factors of production.
57. Glenn D. Morrow, and Orba F. Traylor, *State Liquor Monopoly or Private Licensing?* (The Legislative Council: Commonwealth of Kentucky, 1942), p. 62.



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spirits, all she would have to do would be to double her present \$1 tax."<sup>58</sup>

Tax rates on distilled spirits were not increased in Illinois at that time. However, on August 1, 1959, the excise tax rate on distilled spirits was increased from \$1.02 per gallon to \$1.52 per gallon. According to retail price data supplied by the Licensed Beverage Industries, the resulting increase in retail prices was greater than the increase in the tax.<sup>59</sup> Retail prices in almost all other states were the same in 1960 as they were in 1959.<sup>60</sup> Between 1959 and 1960, consumption of distilled spirits increased by 10.1 percent in Illinois, while the average increase in consumption in the license states was 4.9 percent.<sup>61</sup> Per capita consumption of distilled spirits in Illinois increased from 1.43 gallons in 1959 to 1.60 gallons in 1960, to 1.63 gallons in 1961,<sup>62</sup> which means that in Illinois, consumption of distilled spirits is increasing at a faster rate than the increase in population. Since, in 1960, consumption increased while prices were increasing by more than the tax increase, it is safe to conclude that most, if not all, of the additional tax burden was, at least in the short run, shifted to the drinking public. State revenue derived from the excise tax on distilled spirits increased from \$16 million in 1959 to over \$23 million in 1960. Monthly data on distilled spirits collections, supplied by the Illinois Department of Revenue, indicate that revenue from this source will exceed the 1960 level in both 1961 and 1962.

This all seems to substantiate Dr. Morgan's claim that the demand for distilled spirits in the State of Illinois is quite inelastic. However, under "normal" conditions, a price increase will lead to a reduction in the consumption of a specific product. If both the price of the product, and the amount of the product sold increase at the same time, the demand for the product in question must have increased. Since the percentage increase in per capita personal income was less

58. J. D. Morgan, "Taxation of Alcoholic Beverages," *Report of the Revenue Laws Commission* (Springfield, Illinois: State of Illinois, 1949), p. 564.

59. The price per fifth of Seagrams 7 Crown blended whiskey increased by 10 cents, while the price of Old Forester increased by 21 cents per fifth. Source: "Retail Sales Prices of Leading Brands", Licensed Beverage Industries, Inc.

60. *Ibid.*

61. *Apparent Consumption of Distilled Spirits, 1952-1961* (Washington, D. C.: The Distilled Spirits Institute, 1962).

62. *Ibid.*

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in Illinois than the national average between 1959 and 1960, the reasons for this shift in demand for distilled spirits are not apparent to this writer at this time. No definite conclusions regarding the elasticity of demand for distilled spirits in Illinois can be made without full knowledge of the extent of the increase in demand for this product.

Other students of distilled spirits taxation have claimed that the demand for this product is relatively elastic. Joseph McKenna and Francis Boddy wrote in a paper read before the Forty-sixth Annual Conference of Taxation of the National Tax Association, "Most investigators agree that the best estimate of elasticity for distilled spirits is between 1.0 and 1.5".<sup>63</sup>

In reference to an earlier study the authors wrote "the most recent study, done for the industry by independent economists, leans toward the high side, near 1.5".<sup>64</sup> McKenna and Boddy felt that that estimate was high. They wrote, "The authors lean toward an estimate in the lower end of this range, say, under 1.2".<sup>65</sup>

In an annual publication, the Licensed Beverage Industries, Inc., include a section on the unsuccessful attempts of states to increase tax revenue by increasing tax rates on distilled spirits.<sup>66</sup> However, based on their data, it is impossible to make generalizations regarding the elasticity of demand for distilled spirits. Referring to Rhode Island, the report reads, ". . . the liquor levy was increased from \$1.00 to \$1.50 in 1951. Sales declined 49% in the first full year of the higher tax (against a decline of 12% for the nation as a whole); revenue fell off by 23.5%. Sales in the succeeding year were still 32% below those under the old levy; revenues up only 1.7% from those realized under the old rate."<sup>67</sup> This writer does not question the implication that the demand for distilled spirits in Rhode Island is relatively elastic since it is quite easy to travel to Connecticut or

63. Joseph P. McKenna, and Francis M. Boddy, "How Bad are Liquor Taxes?", *Proceedings of the National Tax Association* (Paper read before the Forty-sixth [sic] Annual Conference of Taxation of the National Tax Association, at Louisville, Kentucky, September 28, 1953), p. 31.

64. *Ibid.*, p. 33.

65. *Ibid.*, p. 33.

66. *Facts About the Licensed Beverage Industry* (New York: Licensed Beverage Industries, Inc., 1961).

67. *Ibid.*, p. 45.

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other neighboring states to purchase a stock of liquor. However, the authors of the study must agree that the demand for distilled spirits in West Virginia, a control state, was probably inelastic when they wrote, "West Virginia . . . raised its gross mark-up on a typical bottle by about  $\frac{1}{3}$  in mid-1957. In fiscal 1960, sales were still 9.3% below those of fiscal 1957—while gallonage sales for the nation as a whole had risen 6.2%."<sup>68</sup> In other words, if the price increased by 33 percent and sales fell by only 9.3 percent (about 15 percent if consideration is given to the national increase), the demand for distilled spirits in that state was inelastic.<sup>69</sup>

Since the retail price per fifth is determined by a state agency in the control states, closer estimates of price elasticity of demand, based on price and consumption data, can be made in these states than in the license states. In December of 1959 an additional tax was levied on distilled spirits in Alabama, which resulted in a retail price increase of slightly less than 10 percent.<sup>70</sup> In 1960, consumption of distilled spirits in that state was 7.7 percent lower than it was in 1959.<sup>71</sup> On April 1, 1959, liquor prices in Ohio were increased by approximately 10 percent. Consumption in Ohio dropped from 11,776,000 gallons in 1958 to 11,415,000 gallons in 1959, to 11,112,000 gallons in 1960, which was a decrease of 3.1 percent from 1958 to 1959, and a decrease of 2.7 percent from 1959 to 1960.<sup>72</sup> A tax increase in Washington on April 1, 1959, resulted in a price increase of slightly over 4 percent per fifth of distilled spirits.<sup>73</sup> Consumption in that state increased by 7.4 percent from 1958 to 1959, and by 3.9 percent from 1959 to 1960.<sup>74</sup> Based on these data, and the fact that the average increase in apparent consumption of distilled spirits in the United States was 4.1 percent between 1959 and 1960,<sup>75</sup> it appears

68. *Ibid.*, p. 45.

69. Gallonage sales were 1,731,000 in 1957 and 1,579,000 in 1958, which represents an 8.8 percent reduction in consumption. SOURCE: *Op. cit.*, *Apparent Consumption*.

70. Price data supplied by the Licensed Beverage Industries.

71. *Op. cit.*, *Annual Statistical Review*, p. 39.

72. *Op. cit.*, *Apparent Consumption*.

73. Price data supplied by the Licensed Beverage Industries.

74. *Op. cit.*, *Apparent Consumption*. (per capita consumption in Washington was 1.17 gallons in 1958, 1.24 gallons in 1959, and 1.27 gallons in 1960. SOURCE: *Apparent Consumption*.)

75. *Op. cit.*, *Annual Statistical Review*, p. 39.

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that the demand for distilled spirits in Alabama was slightly elastic; but that the demand for distilled spirits was relatively inelastic in Ohio. No definite conclusions can be based on the data presented in this section since many determinants of changes in consumption, such as population changes, and changes in income and employment were not taken into consideration.

Even though, in an earlier study, this writer agreed with McKenna and Boddy that the demand for distilled spirits is relatively elastic, the evidence available does not appear to support this, or any other claim with respect to price elasticity of demand for distilled spirits.

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## APPENDIX D

## Retail prices of the Nation's 18 leading brands of

	Seagram 7 Cows	Seagram V.A.	Canadian Club	Old Crow Blended	Imported	See Brand	Current Reserve or Extra
<b>Retail Price Maintenance</b>							
New York .....	\$4.99	\$6.65	\$6.55	\$5.45	\$4.50	\$5.10	\$4.99
New Jersey .....	4.80	6.49	6.45	5.30	4.40	—	4.80
Delaware .....	4.50	6.25	6.10	4.75	4.10	4.60	4.55
Minnesota .....	4.85	6.50	6.45	4.99	4.55	4.85	4.75
California .....	4.89	6.50	6.45	4.99	4.49	4.89	4.89
Massachusetts .....	4.85	6.45	6.35	5.19	4.45	4.90	4.85
Indiana .....	4.90	6.55	6.50	5.00	4.45	4.90	4.90
<b>R.P.M. &amp; Minimum Markup</b>							
Connecticut .....	4.95	6.69	6.60	5.29	4.55	4.97	4.95
Kentucky .....	4.75	6.25	6.25	4.85	3.95	4.85	4.75
Tennessee .....	4.95	6.55	6.50	4.99	4.55	4.94	4.85
Rhode Island .....	4.89	6.54	6.21	5.13	4.42	—	4.89
<b>Minimum Markup</b>							
Arkansas .....	5.27	6.99	6.94	5.60	4.82	5.25	5.27
Georgia .....	5.45	7.00	7.00	5.60	4.95	5.40	5.45
Kansas .....	4.68	6.41	6.29	4.95	4.25	4.65	4.61
New Mexico .....	4.99	6.79	6.68	4.99	4.53	4.99	4.99
<b>"Fair Trade"</b>							
Arizona .....	5.00	6.79	6.78	5.45	4.79	5.00	4.99
Colorado .....	4.95	6.99	6.35	4.99	4.19	4.80	4.95
Florida .....	3.89	5.69	5.69	3.99	3.69	3.99	3.89
Illinois .....	4.29	6.10	5.09	3.79	3.29	3.79	3.69
Louisiana .....	3.75	5.75	5.75	4.00	3.50	4.00	—
Maryland .....	—	—	5.41	5.19	—	4.08	3.96
Nevada .....	4.75	6.40	6.40	4.99	4.35	4.79	—
North Dakota .....	4.95	6.50	6.20	4.75	4.25	5.00	4.95
Oklahoma .....	4.81	6.44	6.31	4.70	4.40	4.75	4.81
South Dakota .....	5.25	6.90	6.90	5.35	4.70	5.25	5.25
Wisconsin .....	4.29	6.50	5.85	4.35	3.69	3.85	—
Wyoming .....	4.60	6.25	6.30	4.75	—	4.85	4.60
<b>Monopoly (State-Owned Stores)</b>							
Alabama .....	4.70	6.65	6.60	4.90	4.25	4.85	4.70
Idaho .....	4.70	6.65	6.60	4.95	4.35	4.95	4.70
Iowa .....	4.11	5.87	5.78	4.32	—	4.31	4.12
Maine .....	4.15	5.95	5.95	4.45	3.80	4.35	4.15
Michigan .....	4.36	6.20	6.13	4.59	3.95	4.52	4.36
Montana .....	4.60	6.60	6.55	4.80	4.15	4.80	4.60
New Hampshire .....	3.80	5.30	5.35	4.00	3.45	3.70	3.75
North Carolina .....	4.05	5.75	5.65	4.25	3.65	4.20	4.05
Ohio .....	4.19	5.81	5.87	4.41	3.83	4.41	4.20
Oregon .....	4.90	6.65	6.60	5.10	4.50	5.10	4.90
Pennsylvania .....	4.99	7.14	7.07	5.27	4.56	5.27	4.99
Utah .....	4.60	6.55	6.50	4.85	4.20	4.85	4.60
Vermont .....	4.10	5.30	5.30	4.30	3.85	4.25	4.10
Virginia .....	4.05	5.80	5.75	4.25	3.65	4.15	4.05
Washington .....	5.05	7.00	6.95	5.30	4.60	5.30	5.05
West Virginia .....	4.25	6.25	6.15	4.50	3.80	4.45	4.25
<b>Free Trade</b>							
Washington, D. C. ....	3.49	4.99	4.99	3.39	3.18	3.49	3.49
Missouri .....	3.79	5.29	5.29	3.68	3.39	3.68	3.88
Nebraska .....	4.45	5.49	5.49	4.50	3.95	4.25	4.50
Texas † .....	4.49	5.99	5.99	4.39	3.79	4.59	4.49

\* Alaska, Hawaii, Mississippi and South Carolina omitted.

† The prices listed in Texas are Dallas prices. Lower prices obtained in Houston, as may be seen on chart 1, p. 4, *supra*.

NOTE: Prices are based upon information supplied to the Moreland Commission by State officials in monopoly States and by large volume stores in other jurisdictions.

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whiskey in 47 jurisdictions, including New York\*

Secretary Reserve	Early Times	Acres Age	Early's Reserve	Fleischmann Preferred	Tes Hill	Old Taylor	Early Dark	Four Roses	188	Early Reserve
\$4.09	\$5.45	\$5.95	\$4.49	\$4.55	\$4.50	\$5.55	\$7.11	\$5.19	\$7.09	\$4.79
4.89	—	6.55	—	4.40	4.35	5.70	6.99	4.99	7.15	4.79
4.55	4.98	4.95	4.10	4.02	3.99	5.35	6.75	4.75	6.85	4.35
4.75	4.99	4.99	4.30	4.59	4.55	5.69	7.35	4.95	7.59	—
—	5.27	4.99	4.49	4.59	3.99	5.75	7.25	—	—	4.77
4.85	5.29	5.29	4.45	4.45	4.50	5.61	6.88	4.99	6.95	4.50
4.90	5.25	5.20	4.45	—	—	5.65	7.45	5.00	—	—
4.95	5.29	5.39	4.49	4.57	4.55	5.85	6.76	5.10	7.25	4.95
—	4.99	4.85	—	—	—	6.49	7.25	4.85	7.39	4.35
4.39	5.29	5.15	—	—	4.45	5.78	7.58	—	7.45	4.80
4.89	—	—	4.89	4.43	4.38	6.75	7.10	4.96	7.20	—
5.27	5.65	5.60	—	—	4.70	6.17	7.65	5.29	7.85	5.15
5.45	5.75	5.70	4.90	5.15	4.85	6.30	7.85	5.50	7.85	5.45
4.36	5.10	4.95	—	4.36	4.25	5.55	6.82	—	—	4.69
4.99	4.99	4.99	4.50	4.58	4.30	5.89	7.83	5.14	7.78	4.77
5.00	5.45	5.49	4.63	4.67	4.34	5.85	7.45	5.15	7.34	—
4.95	4.99	4.99	—	4.60	4.19	5.79	6.79	4.89	6.79	—
3.79	4.49	3.99	3.39	3.79	3.59	4.39	6.19	3.88	6.39	3.59
3.59	3.98	3.79	2.99	3.49	3.19	4.39	5.89	3.79	5.98	3.49
—	4.00	4.00	—	—	3.50	4.75	7.00	—	—	—
3.99	4.33	4.29	3.52	3.69	3.57	5.78	5.83	4.13	5.97	3.84
—	4.99	4.99	—	4.49	3.99	5.69	7.35	—	7.39	3.98
4.75	5.00	4.75	4.50	4.65	4.00	5.75	7.35	5.00	7.55	—
—	5.18	4.75	—	—	4.35	5.78	6.99	4.90	7.19	4.79
5.25	5.35	5.35	4.60	4.60	4.70	6.25	8.10	5.35	—	—
4.08	4.45	3.85	3.79	3.59	3.69	4.88	6.30	4.08	—	—
4.60	5.10	4.95	—	—	—	5.35	6.90	4.32	6.52	—
4.70	5.25	5.15	4.25	—	4.25	5.55	7.25	4.85	7.30	4.65
4.70	5.25	5.15	4.35	4.45	5.00	5.55	7.10	4.90	—	—
4.10	4.61	4.50	3.70	3.81	3.69	4.87	6.35	4.24	6.43	4.09
4.10	4.80	4.65	3.80	4.65	3.75	—	6.40	4.30	6.55	—
4.36	4.89	4.59	3.95	4.06	3.94	5.17	6.67	4.50	6.76	4.23
4.60	5.10	5.00	4.15	4.25	4.15	5.40	7.10	4.70	7.23	—
3.89	4.30	4.20	3.45	4.25	3.45	4.55	5.75	3.85	5.80	3.80
4.05	4.55	4.45	3.65	3.75	3.65	4.80	—	4.15	6.30	4.00
4.19	4.65	4.59	3.81	3.79	3.81	4.94	6.61	4.32	6.52	4.18
4.90	5.40	5.10	4.50	4.60	4.50	5.65	7.00	5.05	7.15	4.85
4.99	5.65	5.27	4.55	4.66	4.54	5.95	7.52	5.15	7.68	4.99
4.60	5.15	4.85	4.20	4.30	5.45	5.45	7.00	4.75	7.10	—
4.10	4.50	4.40	3.85	3.85	—	4.70	5.60	4.20	5.70	—
4.00	4.55	4.40	3.60	3.70	—	4.80	—	4.15	6.45	4.00
5.05	5.65	5.30	4.60	4.75	4.60	5.95	7.35	5.20	7.50	5.00
4.25	4.85	4.75	3.80	3.90	—	5.15	6.85	4.40	7.00	4.20
3.49	3.79	3.59	2.99	3.18	3.18	4.29	5.59	3.69	5.95	3.39
3.79	3.88	3.88	3.33	3.49	3.39	4.39	6.19	3.99	5.99	—
4.50	4.50	4.65	3.95	4.29	4.10	5.95	6.79	4.50	5.90	—
4.39	4.59	4.59	—	4.49	3.89	4.99	6.95	4.59	6.98	4.39

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## APPENDIX E

Report of February 4, 1946 from Arthur F. Robertson to John F. O'Connell, Chairman of the SLA, on conferences held with representatives of the liquor industry.

February 4, 1946.

Mr. J. F. O'CONNELL, *Chairman*:

Submitted herewith is a report on conferences held with various branches of the Liquor Industry with regard to the necessity, now or in the near future, of promulgating rules and regulations aimed at preventing the sale of alcoholic beverages in violation of *fair trade* contracts.

Discussions were first held with representatives of the four major distillers. Starting last November, I met with the following listed persons, representing firms as noted in each instance. Since their views and general attitude toward fair trade contracts, and the enforcement thereof, were so nearly alike, I shall treat these individual discussions as one:

Mr. T. M. Balfe	}	National Distillers
Mr. I. D. Hall		
Mr. S. J. Hamilton	}	Hiram Walker, Inc.
Mr. M. H. Frank		
Mr. B. C. Ohlandt	}	Schenley Distillers
Mr. M. J. Halpern		
Gen. Frank Schwengel	}	Seagram Group
Mr. F. J. Lind		
Mr. Ezra Cornell		

With the exception of the last mentioned, the other distillers reported Fair Trade Contracts presently in effect and under enforcement. Subsequent to our first meeting, the Seagram representative advised me that his companies would put Fair Trade Contracts in effect, on all lines, within two weeks of any announcement by the New York State Liquor Authority to the effect that such contracts would be enforced.

The Distillers' representatives were agreed that price wars are bad for the industry as a whole; that if each distiller or national supplier kept this thought constantly in mind and in effect, there could be no price wars. Whereas these representatives were agreed that a price war was not imminent in the New York area on standard



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goods, there was some small difference of opinion as to the possibility of a price breakdown on so-called "distress goods", by specific reference, rums and grain spirit gins. Three of the representatives felt that such price breakdown could happen as a natural consequence of an over supply on these items and the reluctant acceptance by the public, so long as standard goods are available. Another representative felt serious price breakdown on distress goods could be effectively controlled under provisions of the Hollowell Bill.

The Distiller representatives were agreed that

- (a) Fair trade is a desirable method of operating in the liquor industry;
- (b) That some agency outside the industry should enforce fair trade contracts where such are in effect, either under voluntary or mandatory regulations;
- (c) That the enforcement of fair trade contracts properly falls under present State Control.

Other opinions expressed by these representatives individually, in line with the general discussion, are:

(1) That no price war is imminent because of the limited supply of standard goods, without which you could not create a sustained public scramble for liquor of any type.

(2) That price wars or even sustained price cutting cannot be effective without artificial encouragement from the supplier of any given brand or line.

(3) That distillers with national distribution cannot post prices so low locally as to create a price war, on any given brand or line, without affecting the permanent price set-up of this supplier throughout the nation.

(4) That when Fair Trade price regulations are put into effect in this State, O.P.A. maximums be established as the minimum prices.

(NOTE: This opinion was expressed too late in our conferences to get an expression from three other distiller representatives. This suggestion is covered hereinafter in this report as being opposed to by other groups.)

(5) That Fair Trade contracts cannot presently be effectively enforced by brand owners because of the cumbersome method of bringing a violator to justice. That penalties are not severe enough to discourage and stop persistent price chisellers.

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(6) That there is a noticeable and natural reluctance of sales departments to cooperate effectively with legal departments in the enforcement of Fair Trade contracts.

(7) That among the regulations to be adopted there should be a strict rule on the full and correct identity on each brand case, to include a number so that such could be traced, in case of a price war outbreak.

. . . . .

On November 26, 1945, a meeting was held in these offices with representatives of package store associations, as listed herewith:

Metropolitan Package Store Association, Inc.  
New York City

Chemung Valley Package Stores Association, Inc.  
Elmira, New York

Genesee Valley Package Store Association, Inc.  
Rochester, New York

Oneida County Package Stores Association, Inc.  
Utica, New York

Capitol District Package Stores Association, Inc.  
Albany, New York

Western New York Package Store Association, Inc.  
Buffalo, New York

Associated Liquor Stores of Dutchess County  
Poughkeepsie, New York

White Plains Association—Affiliated with the  
Metropolitan Package Stores Association.

This conference was called at the request of several of the package store associations, and was attended by twenty representatives, including counsel of the associations listed. During open discussion, the following items were generally agreed upon, and are so indicated in the stenographic record of the meeting.

(1) That price cutting presently is statewide among the known "price chisellers".

(2) The price cutting, from 25 cents to 50 cents per bottle, is in effect with these dealers, on standard brands, under Fair Trade contracts, and that such information has been brought repeatedly to the attention of the brand owners, without any effective results.

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(3) That such price cutting is practiced by these dealers to effect tie-in sales of off brand merchandise.

(4) That rums and grain spirit items are being offered at prices slightly above dealers cost.

(5) That price cutting is widespread on standard brands of blended whiskies most generously distributed; that this is a certain indication that a price war will result as soon as stocks return to normalcy.

(6) That these associations, representing, according to their own statements, approximately 90% of the licensed retail liquor dealers, have no confidence in the intention or ability of distillers and other brand owners to avoid price wars or to maintain any discipline among certain known price chisellers, and that under present Fair Trade agreements these dealers, attempting to abide by stipulated prices, are at a severe handicap, and that they unanimously agree that provisions of the amendment to the Alcoholic Beverage Control Law, relating to Fair Trade price regulations, be made mandatory and effective at the earliest possible time.

The representatives of these Associations, in private meeting, by recess of this same conference, adopted and then offered the following as proposed rules and regulations:

*Rule One:* No brand of any alcoholic beverage, except beer, shall be distributed and sold in the State of New York except pursuant to a Fair Trade contract, entered into in accordance with the provisions of Article 24a of the General Business Law.

*Rule Two: Filing and Mailing of Contract:* The owner of any brand of alcoholic beverages now being distributed and sold in the State of New York shall on the 20th of the month following the promulgation of these regulations or in case of a new alcoholic beverage being introduced by a new brand owner on or before the 20th of the month, file a copy of their Fair Trade Contract with the State Liquor Authority together with a schedule of consumer resale prices by the bottle which shall be uniform throughout the State, which resale prices are to take effect on the first day of the following month. On the same day of filing with the Authority, a copy of the Fair Trade Contract and schedule shall be sent by every brand owner to every retailer for consumption off the premises in the affected trading area by registered mail.

*Rule Three: Amendments:* A Fair Trade Contract may be altered or amended by filing such alterations or amendments

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with the Authority on or before the 20th of any month to become effective on the first of the following month. The mailing of the amendment or alteration shall be the same as provided for in Rule Two.

*Rule Four: Resale prices:* The retailer for off-premises consumption shall sell at the stipulated prices only.

*Rule Five: Close outs for the purpose of discontinuing delivery of brand:* A retailer for off-premises consumption shall not make a close out sale of alcoholic beverages for the purpose of discontinuing delivery of such alcoholic beverages at less than the stipulated resale price or prices without having a close out permit from the Authority. He must show the Authority that, first, he has had the merchandise for six months; second, he has offered to return the merchandise to the vendor and producer ten days before applying to the Authority; and, third, he has not brought the merchandise into the State for the purpose of conducting a close out sale. Notice that the sale is a close out must be given to the public and any advertising must show the quantity offered and the close out permit number in letters and figures no smaller than the largest used in such sign posters or advertising. If the application for a close out sale is denied, the Authority shall, either, first, compel the vendor or producer to retake such merchandise if in good condition at the market price or invoice price, whichever is lower or, second, require the licensee to sell at the stipulated resale price. Where a brand has been closed out with the permission of the Authority, the retailer shall not repurchase the same brand for one year after the close out sale and then only after receiving the permission of the Authority on good cause shown.

*Rule Six: Damage or deterioration:* A special permit to sell any deteriorated alcoholic beverages at less than the stipulated resale price shall be secured from the Authority, and the Authority shall not issue the permit unless convinced that the facts warrant the sale. The public are to be given similar notices as provided for close out sales under Rule Five.

*Rule Seven: Fluctuation of Resale Price:* No brand owner, licensee or group of licensees, shall cause any fluctuation in the stipulated resale prices of any brands which practice in the opinion of the Authority shall disrupt the orderly distribution of alcoholic beverages and tend to defeat the purpose of these regulations by fostering and promoting internal arguments.

*Rule Eight: Private Brands:* Brands which are owned exclusively by one retailer and sold within the State by such retailer are excepted from the operations of these rules and regulations.

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*Rule Nine: Penalties:* For the violation of these rules and regulations, the Authority may suspend, cancel or revoke a license as follows: For a first offense, not exceeding ten days' suspension of license. For a second offense, not exceeding 30 days' suspension of license. And for a third offense, the Authority may suspend, cancel or revoke the license. That is our recommendation to the Authority insofar as the regulations are concerned."

After the proposed regulations were put on the record, further discussion ensued and the following points were made by individual representatives, without challenge from other representatives, and therefore taken as an expression of those present:

(a) Accused distillers of reimbursing certain large retailers for expenses incurred in defending court actions on violations of Fair Trade Contracts.

(b) That distillers and other brand owners, or exclusive distributors, are not interested in maintaining Fair Trade Contract provisions and that such are now devising ways and means of evading any stipulated regulations, through certain trusted and favored retail outlets.

(c) That certain suppliers purposely supply selected retail outlets with brands of whiskies labeled and intended for bar use only, for the purpose of circumventing Fair Trade agreements in effect on the same brand under a different colored label.

(d) That large New York City retailers have circularized industrial plants Up-State offering "bargains" in whiskies and rums, resulting in solid express car shipments to such areas; that such type of inducements should be regulated against, in addition to price control.

(e) That forced tie-in sales by suppliers to bars and grills, has resulted in such licensees surreptitiously disposing of these off-brand items, also rums and wines thus purchased, over the bar, for off premise consumption, at prices less than cost, thus disrupting the demand for such items in any given community.

(f) That along these same lines, certain Country Clubs are being favored in quantity shipments of scarce items, provided they accept from the suppliers large quantities of rums, wines and other items of small acceptance at stipulated prices, and that these clubs dispose of the unwanted items at cost or less, to members, thus disrupting whatever demand there may be among the retailers for these same items which these retailers are required to accept from the suppliers, and are expected to resell at prices under Fair Trade Contracts.

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(g) That large New York City department stores use prominent newspaper space to announce plentiful supplies of scarce items and urge case lot sales; that provision be made in regulations to bring such advertising under control to see that same is not misleading; that such scarehead liquor advertising disrupts sales and control in rural communities.

Subsequent to this conference, various representatives of the retailers supplemented their conference statements on price cutting, by forwarding newspaper advertisements and circulars, from several cities, each of which contains one or more items under present Fair Trade Agreements, quoted at a lower price. The Metropolitan Package Store Association, Inc., sent a letter dated December 4, 1945, citing a report submitted by a shopping agency indicating that 36 stores in the Counties of Bronx, Kings, New York, Queens and Westchester were selling one or more whiskies under Fair Trade Contracts at prices lower than those stipulated and agreed upon.

. . . . .

At the request of Mr. Morris O. Alprin, Counsel to the Greater New York Wholesale Liquor Dealers Association, Inc., a meeting was held in the State Liquor Authority offices on December 7, 1945, attended by the following:

Mr. Alprin

Mr. Irving Koerner, President of the Association  
and associated with R. C. Williams Company

Mr. Morris Scheinick, President of Alpine Wine and  
Liquor Corporation

Mr. Sam Aronowitz, Counsel for the Hudson Valley  
Distributors, Inc.

Mr. Harry Levinthal, associated with the firm of  
M. Lichtman & Company, Syracuse, New York

Mr. William Toussaint, representing Hudson Valley  
Distributors, Inc. and associated with Rodgers  
Liquor Company, Inc., Albany, New York

This group were unanimously of the opinion that the New York State Liquor Authority should promulgate rules and regulations for price control, under Fair Trade Contracts, at the earliest possible time.

They were also of the opinion that all levels of the liquor industry should be brought under such regulations.



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Messrs. Alprin and Arrowitz, on behalf of the two associations listed, such associations said to represent a majority of New York State liquor wholesalers, presented a memorandum in support of their proposal that the State Liquor Authority promulgate rules and regulations with reference to Fair Trade agreements and action by the Authority against violators. The memorandum, in its entirety, is made a part of this report. Quoted from the mentioned memorandum, is the following with regard to any proposed rules and regulations:

"One of the first points for the Authority to consider is whether or not, under such rules and regulations, fair trade agreements should be *voluntary or mandatory*. There is much to be said in behalf of each of these propositions.

It may be argued that many brand owners would not enter into fair trade agreements if the Authority adopted rules and regulations with respect to *voluntary* agreements only. It may also be argued that where fair trade is mandatory as, for example, in New Jersey, operations and business conditions are much cleaner. This, of course, is a question of policy for the Authority to determine. It might very well provide rules and regulations based on voluntary fair trade agreements in the first instance, and, if the situation thereafter required it, then further rules and regulations might be adopted making such agreements mandatory. Under a system of voluntary agreements, the Authority would be able to ascertain the extent and amount of cooperation from brand owners, and if this was obtained there would be no necessity for requiring mandatory fair trade agreements.

Another question would be whether or not *all items* should be covered by fair trade agreements. There is the argument that private brands belonging to one retailer and not in competition with any other retailer should be exempt. This may be fraught with peril to the entire program. It would enable large volume stores, when merchandise is available in quantities, to make up their own brands and advertise them extensively on the basis of price.

There is also the problem with respect to the so-called war-time items, that is, imported Spanish and Portuguese brandies, imported wines, rums, etc. There is comparatively a large inventory of such items in the hands of manufacturers, importers, wholesalers and retailers. It may be argued that to put such items on fair trade would make them practically unsaleable. On the other hand, however, it might very well be argued that such merchandise would be purchased by the public as and when



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required, regardless of price, that permitting distress prices would not properly follow the first guide post of the Legislature, that it would not foster and promote temperance. Again, here is a question of policy for the Authority to decide.

The Authority might consider a proposal that where, under a fair trade agreement, an injunction or court order is obtained against a retailer a certified copy in such proceeding might be prima facie evidence against the offending retailer on the basis of which the Authority could institute proceedings against the violating retailer. In such instance, the investigation, proof of sale, and decision of the court could be available to the Authority without further investigation or administration efforts by it.

The Authority might also consider a proposal that all fair trade contracts should be filed with it. Likewise, all changes or amendments to such contracts.

The Authority might also consider a proposal that all advertising based on price, such as newspaper advertisement, circulars, hand-bills, etc. be submitted to the Authority so that same might be checked against any fair trade contracts on file with the Authority."

The wholesalers' representatives request that, when the Authority adopts rules and regulations with respect to Fair Trade and action against violators, it submit such proposed rules and regulations to the various branches of the industry for study, comment and suggestions. They feel that such procedure would insure the Authority the benefit of business practices and show from a practical and operating viewpoint how such proposed rules and regulations might be altered or changed, with a view to better administration and successful operation.

. . . . .

On December 3, 1945, Mr. E. S. Underhill, Jr., President of the Urbana Wine Company, Hammondsport, New York and also President of the Finger Lakes Wine Growers Association, together with Mr. Charles A. Winding, Attorney, attended a conference in these offices, on the subject of Fair Trade practices and regulations.

Mr. Underhill, speaking for members of the aforementioned association, went on record as being unalterably opposed to the Authority's promulgating any rules or regulations, under Chapter 687, which would prohibit or regulate the sale of alcoholic beverages, in violation of the provisions of Fair Trade Contracts, pursuant to the provisions of Article 24A of the General Business Law.

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Mr. Underhill contended that the State Liquor Authority had no power under last year's amended legislation to make fair trade practice contracts mandatory. That authority given is permissive rather than mandatory. That the brand owners should determine, individually, whether they wish to enter into Fair Trade Contracts, to cover their products in the market, and that his Association is opposed to any such extreme of governmental regulation.

Mr. Underhill argued that Fair Trade practices tended to increase rather than merely to maintain retail prices. That certain large retailers who are now criticized for their sales practices, thought to be detrimental to smaller independents, would purchase alcoholic beverages under private label and sell them at any price they desire.

This spokesman urged that if the Authority deems it necessary to take action under Chapter 687 that it limit itself to the enforcement of voluntary fair trade contracts.

Mr. Underhill came here again on January 25, 1946 and reiterated the objections of his Association members to mandatory regulations by the Authority.

. . . . .

On January 5, 1946, the following listed persons, representing the New York Importers and Distillers Association, Inc., conferred here on the subject of Fair Trade price regulations as affecting imported wines, liquors and specialty items:

Mr. Joseph Garneau Ringwalt, Chairman of Association and also President of Joseph Garneau Company, Inc.

Mr. Joseph G. Ringwalt, Jr.

Mr. I. M. Bomba, Vice-President of the Association and an officer of Schieffelin & Company.

Mr. Lester H. Schreiber, Counsel.

Mr. Ringwalt, as spokesman for this Association, went on record as opposed to any mandatory price regulations and said that if the Authority finds it necessary, in order to control orderly distribution of alcoholic beverages, it should confine itself to the supervision and enforcement of voluntary fair trade contracts.

Mr. Ringwalt, speaking as an individual, stated that none of the imported wines or specialty items handled by his firm have ever

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figured in price wars. He questions that the State Liquor Authority will ever have the personnel to enforce fair trade agreements which would be entered into by persons under compulsion. He states further that mandatory fair trade would serve as an instrument by which groups in the industry could dictate by embargoes the profit margins at which brands, other than those owned by retailers, would be sold, and that enforcement by the State Liquor Authority would support these combinations in restraint of trade. He cited that most State Liquor Control Boards encourage the purchase of light wines as a contribution to temperance, and that it would be manifestly unfair to require fair trade agreements on sale by the bottle, as applicable to a single case or more, or anticipating sales in quantity which would be applicable by the bottle.

Mr. Ringwalt proposes that should the State Liquor Authority find that conditions with respect to promotion of temperance, orderly distribution, or the interests of the consumer, require the use of its discretionary power

(1) Regulations should be applicable only to those brands whose owners are found to be unable or unwilling to obtain orderly distribution; or

(2) Be applicable to types or kinds of beverages involved in disorderly distribution.

Subsequent to this conference, Mr. Schreiber, Counsel, filed a memorandum titled, "Memorandum in Relation to Promulgation of Fair Trade Regulations Pursuant to Chapter 687 of the Laws of 1945." The memorandum as attached to this report, states that it represents the views of a majority of the members of the New York Importers and Distillers Association, Inc., and that it is not intended to represent the views of domestic distillers as might be implied by the name of the Association, except such branches of their business which relate to the importation and sale of foreign alcoholic beverages.

Mr. Schreiber cites that a poll of members was taken in May 1945 and that sixteen members were opposed to mandatory issuance of fair trade agreements on all brands of alcoholic beverages offered for sale, and seven members were in favor of such.

The aforementioned memorandum argues that:

(a) The evils of price competition can be eliminated by means other than compulsory fair trade agreements.

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(b) Mandatory agreements stifle individual initiative.

(c) Fair trade will increase the cost to the consumer (based on Federal Trade Commission report that under fair trade agreements, manufacturers and distributors are coerced into allowing larger mark-ups by retailer groups).

(d) Mandatory fair trade is not an absolute cure (that it will not prevent "deals" via private brands).

(e) Mandatory Fair Trade cannot be administered successfully without the cooperation of the brand owner.

(f) The New York State General Business Law does not permit sales above a so-called minimum resale price (that the effect of mandatory agreements would prevent higher prices on special items and thus affect personal service to the customer).

Mr. Schreiber's memorandum proposes that when in the discretion of the State Liquor Authority trade conditions require some regulation of resale prices, such regulations be restricted to voluntary fair trade agreements plus the prohibition against the advertising of prices on brands not subject to such agreements.

Subsequent to the conference first held with the representatives of the Schenley Corporation, Mr. Paul Dubonnet, President of the Dubonnet Corporation, and locally affiliated with Schenley Import Corporation, accompanied by Mr. Morris Halpern, Counsel, came here to request immediate and mandatory fair trade agreements, because of the "breakdown" in prices on Dubonnet Wine.

Mr. Dubonnet was emphatic in stating that he wants his product maintained at the minimum now covered by Fair Trade Contracts. He later cited five metropolitan retailers who were selling below the stipulated prices.

Respectfully submitted,

A. F. ROBERTSON

*Executive Assistant*

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EXHIBIT F, ANNEXED TO AFFIDAVIT OF THOMAS F. DALY

FOR IMMEDIATE RELEASE, MONDAY, FEBRUARY 10, 1964

ROBERT L. McMANUS, PRESS SECRETARY TO THE GOVERNOR

STATE OF NEW YORK

EXECUTIVE CHAMBER

Albany

February 10, 1964

TO THE LEGISLATURE:

In the years since the national repeal of Prohibition, the administration of the State's liquor control law has been marked by periodic instances of corruption and favoritism, leading to a loss of public confidence and disrespect for the law.

Following indications of misconduct in 1962, I promptly appointed a Moreland Commission, composed of three eminent lawyers with distinguished records of public service. I commissioned them to make a thoroughgoing reappraisal of the law in the light of the State's experience and in the light of current social and economic conditions. The Commission has now submitted the first comprehensive and objective analysis of this important subject undertaken anywhere in the Nation since Prohibition was repealed. This analysis is the result of careful research and thorough public hearings.

The Commission reports the following:

(1) That corruption and favoritism have been facilitated by a statutory approach to liquor control which is out of keeping with modern life and contrary to regulatory experience in other fields.

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(2) That while our liquor control law was conceived to promote temperance and respect for the law, the facts demonstrate that the prescribed system has failed to accomplish these worthy objectives; some of the controls and regulations piled up under the law through the years have in practice defied objectivity, encouraged corruption, added nothing to promote temperance and have served to breed public disrespect for the law.

(3) That the liquor industry has acquired the dominant hold in a field properly regarded as one requiring public regulation; no other industry has its economic interests so uniquely favored with statutory protections; and it is contrary to the public interest to have the regulated industry in such a dominant role.

In making its reports and recommendations, the Moreland Commission has set as its goals:

- Eliminating unnecessary statutory restrictions which have served as an encouragement to corruption, favoritism and hypocrisy in liquor control.
- Bringing justice to the consumer by putting to an end the artificial devices whereby the liquor industry has received uniquely beneficial treatment at the consumer's expense.

I believe that the Moreland Commission has made a tremendous contribution to public understanding of the problems of liquor control. I am transmitting to your Honorable Bodies three reports of the Commission with my full support of its recommendations. I urge your favorable consideration of these reports and your enactment of legislation at this Session carrying out the Commission's recommendations.

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### A. *Restaurant Licenses*

1. *Commission Findings.* The Moreland Commission's findings indicate that:

- The requirement of present law that only restaurants may sell liquor by the drink has resulted in widespread abuses as well as economic hardship to licensees.
- Most of the establishments in the State with so-called "restaurant" licenses are in fact bars only. Less than 25 percent of their gross revenues are derived from the sale of food—a percentage substantially less than the required minimum.
- This widespread and notorious violation of present law has induced many licensees to engage in petty dishonesty and to falsify their books and records of food sales. The present law cannot be enforced because many licensees cannot afford a full-time chef, high rents for unused kitchen and dining space, expensive outlays for unneeded equipment and the costs of wasted food.
- At the same time, the present law specifically rejects any requirement that "food be sold or purchased with any beverage." It thereby recognizes that individuals drink alcoholic beverages separately from their meals.
- This hypocrisy and encouragement of fraud must be ended. Justice should be restored to licensees conducting establishments for on-premises consumption.

2. *Commission Recommendations.* On the basis of its findings, the Moreland Commission recommends that:

- The law be amended to eliminate present provisions limiting licenses for on-premises consumption to



restaurants and other eating places. Thus, premises whose principal business is the serving of alcoholic beverages would be recognized frankly for what they are. They would continue to qualify for liquor or beer licenses, to be known as tavern licenses, and undesirable activities would continue to be specifically prohibited by other provisions of law. The law would be changed to permit modified food requirements appropriate for tavern licensees.

- The restaurant license would be preserved in the law for those premises whose principal business in fact is the serving of meals.
- To provide an orderly transition period, applications for tavern licenses by persons not now holding restaurant licenses should be limited or even prohibited for one year. During this transition period, present licensees would be allowed to convert to a tavern license.

## B. *Package Store Restrictions*

1. *Commission Findings.* The Moreland Commission findings indicate that:

- No new package store licenses have been issued in New York State since the "moratorium" of 1948. In that period the population of the State has increased sharply and new residential centers have grown. Concurrently with these changes in population, per capita consumption of alcohol has increased substantially.
- This sales growth has resulted in many package store owners profiting not from their own business efforts, but from the windfall of restricted competition. Many persons desiring to enter the field have been unable to do so since no new licenses have

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been issued since 1948. These factors have combined to create a substantial artificial market dealing in "keys" to existing package stores, at prices which frequently have been astounding.

- The moratorium has resulted in a tremendous premium on the privilege of moving a package store from one location to another. The administrative decisions to allow or disallow these moves have been arbitrary and inconsistent. No useful purpose can be served in permitting the continuance of "removal" restrictions which defy rational decision-making.
- Other provisions of the present law are out of place in a free enterprise system. They grant unwarranted protections against competition to the package store industry.
- One example is the statutory requirement that package stores on the same street must be located at least 1500 feet from each other in New York City, and at least 700 feet elsewhere in the State. No one seems able to explain how these distances were originally determined. In any event, careful studies now show that there is no discernible connection between temperate and lawful behavior and the establishment of such arbitrary and compulsory distances between package stores. These distance requirements have no present purpose except to restrict competition.
- Two more anomalous statutory restrictions are the limitation of one license to an individual and the provision that package stores may sell only wine and liquor. Experience has not shown either of these provisions to have any special merit in promoting temperance and respect for law. Experience

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in other states has shown that the absence of such provisions produces no adverse effect upon temperance or law-abidance.

- People have come to expect the convenience and efficiencies of modern marketing methods and of open competition. There is no reason why citizens should be denied these benefits in the alcoholic beverage field.

2. *Commission Recommendations.* On the basis of its findings the Moreland Commission has recommended legislation that would:

- Eliminate the distance now required to exist between package stores, without changing, however, the prohibition against liquor stores within 200 feet of churches and schools.
- Provide that anyone who meets the objective standards of existing law (such as good character, the absence of a criminal record and financial responsibility) should be granted a license. The license would attach to the licensee rather than to the premises, and a licensee would be allowed to operate more than one outlet. Licenses would be automatically renewable each year, unless terminated for cause.
- Allow licensees to sell items other than liquor and wine, provided that they are sold only in areas completely separated physically from the liquor and wine department. Sodas and other mixes, however, could be sold in the same department as alcoholic beverages. The requirement of a physically separate department would continue the protection against possible unlawful sales.
- To put these changes into effect in an orderly way, end the “distance” and “removal” rules immediately.

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No new licenses would be issued for one year. During that year, present licensees would be permitted to move their premises to shopping centers or any other location in the State which complies with local zoning ordinances, and is not within 200 feet of a church or school. Present licensees would also be allowed immediately to carry non-alcoholic beverages commonly associated with the consumption of liquor.

- Under this transition period, make available, one year from the effective date of these new laws, 500 licenses for qualified applicants paying an initial fee of \$5,000 each. The following year an additional 500 would be made available at an initial fee of \$2,500. If there are more qualified applicants than licenses, the 500 each year would be selected by a public drawing. After this three-year transition period, any applicant who meets the requirements would be entitled to a license upon payment of a \$1,000 initial fee.

### *C. Distiller-Fixed Consumer Prices*

1. *Commission Findings.* The Moreland Commission's findings indicate that:

- Under the present law, the State Liquor Authority enforces minimum retail prices of packaged liquor. These prices, however, are fixed not by the Authority but by the distillers themselves and are not subject to any review by the Authority in the public interest.
- This provision of the law originated in 1945. Its justification was said to be a fear that the "price wars" which occurred just prior to World War II would reoccur after the War's end, with alleged

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disastrous results to package store owners, and, so it was said, to New York and its citizens as well.

- Actually the State Liquor Authority believed that discriminatory favoritism by distillers and wholesalers was primarily responsible for occurrence of the "price wars." Yet these same distillers were given the sole and exclusive right to fix prices. This unique right was combined with the threat that any package store owner who attempts to pass on to his customers, through lower prices, the benefits of efficient operation will be faced with the suspension or loss of his license by administrative action of the State Liquor Authority.
- Such a compulsory resale price maintenance is at war with the American system of free competition.
- The result is that New York consumers have been compelled to pay on the average \$1 more per fifth of liquor than they would have to pay if there were a free market. This price difference is not explained by differences in excise taxes, fees and retail operating costs. The total bill for this surcharge foisted on New Yorkers now runs to \$150 million a year and it is rising every year.
- This present system of price control has no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol.
- If the industry feels that it must have price-fixing, the provisions of the Feld-Crawford Law are available to it as to any other business. Under that law voluntary price-fixing agreements between distributors at successive levels can be enforced in the

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courts by private litigation. Moreover, other present provisions of law prohibit price discrimination in sales to liquor wholesalers and retailers—a major weapon against “price wars.”

2. *Commission Recommendation.* On the basis of its findings, the Moreland Commission recommends that:

- Section 101-c of the Alcoholic Beverage Control Law—which compels the State Liquor Authority to maintain resale prices set by the distillers—should be repealed.

### *Conclusion*

The recommendations of the Moreland Commission call for forthright decisions and action. The system which has developed under the law during the past thirty years has necessitated individual and subjective judgments—in too many cases arbitrary, discriminatory and capricious—thus opening the door to repeated instances of corruption and loss of public confidence.

Together we must act responsibly to rectify these errors of the past. The major recommendations of the Moreland Commission are in effect in other states. With determined action now, this State can have sound liquor control laws, honest enforcement, fairness to those in the liquor business, justice to the consuming public—and at the same time an atmosphere of temperance and respect for law.

/s/ NELSON A. ROCKEFELLER

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GOVERNOR'S MESSAGE TO LEGISLATURE  
ON  
ALCOHOLIC BEVERAGE CONTROL LAW  
AMENDMENTS

April 16, 1964

TO THE LEGISLATURE (In Extraordinary Session):

I have called your Honorable Bodies into Extraordinary Session and pursuant to provisions of Article IV, Section 3, of the Constitution, I submit for your consideration and action liquor reform legislation pertaining to the following subjects:

(1) The repeal of Section 101-c of the Alcoholic Beverage Control Law, the provisions under which manufacturers and wholesalers fix minimum consumer resale prices for liquor, and the enactment of

(a) amendments to Section 101-b of the Alcoholic Beverage Control Law to make it clear that its only purpose is to prevent each distiller from discriminating in price between wholesalers and each wholesaler from discriminating in price between retailers, and to remove any question that it might permit a distiller to fix the price charged by a wholesaler or a wholesaler to fix the price charged by a retailer,

(b) a provision that each distiller or wholesaler must certify that the price charged in New York for its brand of liquor is at least as low as the price charged in any other state or Washington, D. C., with false certification



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to be a misdemeanor and a basis, upon conviction, for a refusal to permit the brand of liquor to be sold in the State for a period not exceeding three months,

(c) a prohibition against the retail sale of liquor below cost, and

(d) an amendment to the present prohibition against beer price advertising to include liquor price advertising.

(2) The repeal of the provisions of the Alcoholic Beverage Control Law mandating minimum distance requirements between retail stores licensed to sell for off-premises consumption, but retaining the present minimum distance requirements between such a retail store and a church or school.

(3) The repeal of the unrealistic food requirements for bars and grills, and the enactment of

(a) provision for a class of license for on-premises consumption, to be called a "special on-premises" license, and the qualifications and conditions for such licenses,

(b) a requirement that "special on-premises" licensees have only simple foods available for sale to customers, with the State Liquor Authority barred from requiring that receipts from food sales be substantial or a fixed percentage of total receipts from all sales, and

(c) an amendment of the local option provisions to permit voters in a locality to vote with respect to sales at retail for consumption on the premises of "special on-premises" licensees.

(Signed) NELSON A. ROCKEFELLER

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IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

## AFFIDAVIT OF FREDERICK J. LIND IN SUPPORT OF MOTION

State of New York,  
County of New York, ss:

FREDERICK J. LIND, being duly sworn, deposes and says:

I am Vice President and General Counsel of Joseph E. Seagram & Sons, Inc., an Indiana corporation with its principal office and place of business at 375 Park Avenue, New York, New York. I am making this affidavit in support of the motion for a temporary injunction and for a stay pending the hearing and determination of that motion.

Joseph E. Seagram & Sons, Inc., through its wholly owned subsidiary, The House of Seagram, Inc., sells liquor in all states of the United States (with the exception of Mississippi) and in the District of Columbia.

The principal brands sold by Seagram's are Seagram's 7 Crown, Seagram's V.O., Seagram's Gin, Lord Calvert, Calvert Extra, Calvert Gin, Four Roses and Kessler. The House of Seagram, Inc., through its importing divisions, also sells Chivas Regal Scotch, White Horse Scotch, Ronrico Rum, Martell Cognac and Noilly Prat Vermouth. The House of Seagram, Inc. sells as well a large number of domestic and imported brands in addition to those mentioned above.

A substantial part of the products of Joseph E. Seagram & Sons, Inc. are sold in the State of New York.

In many states the price at which Seagram products are sold to wholesalers is not required to be fixed for any specific time period, such as is required by New York and other posting states. In these markets, field supervisors are given considerable freedom to vary the price from time to time depending upon competitive pressures.

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The recent amendment of the New York Alcoholic Beverage Control Law, Chapter 531 of the Laws of 1964, Section 9(d), will require Seagram's to file, in conjunction with its schedule of prices, an affirmation that the prices at which it sells brands to wholesalers in New York State are no higher than the price at which it sells those same brands in other states and no higher than the price at which some "related person" sells the same brands in any other states. Paragraph (f) of Section 9 of the new law imposes a similar requirement on sales between wholesalers and retailers, but it is unclear precisely who is to file the affirmation under (f). It does appear, however, that Seagram's, either as a brand owner or wholesaler designated as agent, will be required to verify the material contained in affirmations submitted under both paragraphs (d) and (f).

In order to affirm that our prices to wholesalers and retailers in New York are no higher than the lowest price at which our brands are sold by "related persons" in any other state we must determine first who is a "related person", secondly, we must determine what is the "price" during the specific one-month period of time at which such "related persons" sell to wholesalers and retailers. These are simple questions for which we have no simple answers. It will in fact be impossible for Seagram's to answer these questions at all. The definition of "related persons" found in both paragraphs (d) and (f) of the new liquor law is vague. The definition states that persons are "related persons" if they do "exclusive principal or substantial business in the sale of brands purchased from a single brand owner." What is meant by exclusive principal or substantial business? Of the 330 wholesalers selling Seagram throughout the country, sixteen do 75 per cent or more of their business in the sale of our brands.

Sixty-one do approximately 60 to 75 per cent in the sale of these brands; seventy-three do 40 to 60 per cent, seventy-nine, 20 to 40 per cent; sixty-four, 5 to 20 per cent; thirty-seven, 1 to 5 per cent. Where do we draw the line to define which of these wholesalers do a "substantial business" in the sale of our products and are therefore "related persons"? If the judgment in drawing the line between what is and what is not "substantial" is incorrect, the officer making the affirmation may be criminally prosecuted under the provisions of paragraph (j) of Section 9 of Chapter 531 for this error in judgment.

Even if it would be possible by some method to determine who are "related persons", there is not now and there could not be created sufficient machinery to determine with any reliability the price in a given month at which Seagram's brands are sold to wholesalers and retailers. Many states sanction a wide variety of discounts to be given to wholesalers and retailers which are not permitted in New York State. In states where different types of discounts are permissible, field supervisors must exercise both imagination and flexibility in meeting and responding to the competitive pressures which are so much a part of the liquor industry. In these states, Seagram's may grant to wholesalers depletion allowances which amount to deferred discounts, the amount of such discount not being determined until in some cases many months after the sale is made.

In some cases increased discounts are given to wholesalers whose sales of a brand in a given year exceed their sales of the same brand in the preceding year. Such a discount, under what we call an "escalator plan", is not determined until the year's end. Such deferred discounts pose a frustrating and impossible situation when we try to determine in any given month what is the price of one of our brands. The new liquor law in Section 9, para-

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graph (i) requires in determining what is the price of one of our brands in another state, that we include "all rebates, free goods, allowances and other inducements of any kind whatsoever". Certainly discounts in the form of depletion allowances or under the escalator plan would have to be included in computing the lowest price, yet it may be as long as a month or a year before we can determine what is the discount and therefore what is the price at which the brand was sold during the period in question. I have no idea how such discounts, however, could be allocated to sales in any specific month.

The impossibility of complying with this Act is even more sharply illustrated by the requirement that brand owners or wholesalers designated as agents must verify that the prices at which brands are sold in New York by wholesalers to retailers are no higher than the lowest price at which such brands were sold to retailers in other states by "related person" wholesalers in those states. Even if we could determine who these "related persons" are, we would have no power whatsoever to compel them to furnish us with any of their price information, for they are in all cases independent operatives under no legal compulsion to divulge their prices to manufacturers. If they did furnish us with such information, we would have no way of knowing whether the prices given by them were complete and accurate. If their discounts varied during the month, which is not uncommon, then they would have no way of telling us what the "price" was during the month.

The variety of "other inducements" employed by wholesalers in their sales to retailers is limitless. Discounts are sometimes given over a two to four week period but such period need not run within the calendar limits of a given month. What then is the price for that month?

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Wholesalers may also grant depletion allowances to retailers. Here again, assuming what will often be impossible, i. e., that we would be advised by the wholesalers of the discount, it is impossible to determine what is the wholesale to retail price in a given month. The State of California permits the granting of discounts on what is termed a "family plan" sale. Under such a plan, a wholesaler could offer a single package of a number of cases of various brands and grant a flat discount for the entire purchase. Although one could determine the discount in such cases, it is impossible to determine to what specific brands and in what ratio such a discount would be allocated.

Retailers would refuse to buy Seagram products if they were not supported by local and national advertising of brand names. Such advertising would appear to come within the definition of "other inducements" in the New York Act. It presents an impossible administrative task to break down these local and national advertising expenses, allocate them to specific sales to wholesalers and to specific sales to retailers, and further allocate such expenses to the price of a specific bottle or case of liquor sold in any given state at a specific time.

As I read the new liquor law, if for example Seagram's would run a magazine advertisement in a national magazine for Seagram's 7 Crown Whiskey, we would have to determine the effect of that advertisement on every community in the United States and allocate as an increment of price a portion of that advertisement to the sale of each bottle or a case of whiskey sold by each wholesaler and by each retailer throughout the country. That such a task is impossible is self-evident. That such an undertaking is commanded by the New York liquor law is equally self-evident.

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The only way in which we could approach compliance with the New York liquor law would be to eliminate even in states where they are permitted, all of these special discount practices and to impose throughout the country a single unvarying price for all Seagram brands sold to wholesalers and by independent wholesalers to retailers. Such a procedure, if possible at all, would certainly be violative of federal and state antitrust laws.

There is intense competition between distillers, large and small, for what each considers to be his fair share of the liquor market. It is this competition which requires distillers to employ the variety of discount practices discussed above. No distiller can survive without competing on this basis. The New York Act requires the elimination of these marketing practices and as a result a lessening of competition in states where such practices are permissible. This result would appear to run contrary to the policy behind the federal antitrust laws.

Paragraph 3(a) of Section 7 of the new New York liquor law requires that a schedule be filed in New York as to the price at which liquor is sold to a wholesaler, "irrespective of place of sale or delivery". This section would require that a price schedule be filed in New York for the sale of liquor which might be produced in Georgia and sold to a wholesaler in Florida—a sale which would have no conceivable connection with New York State. It is hard to believe that such was the intent of the drafters of paragraph 3(a); nevertheless, the filing of schedules as to such sales appears to be clearly commanded by that paragraph.

Liquor competes with wine for the customer's favor but for some unknown reason only distillers and wholesalers of liquor are singled out and subjected to the affirmation and verification burdens of the new law. Similarly, distilled spirit brands owned by a single New



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York retailer, so-called "private labels", are exempted from the price affirmation requirements of the new Act. Since our product line is in direct competition with these "private labels", I can see no reason why they are exempted from the burdens of the statute.

The problems created by compliance with the New York liquor law are so great that even if Seagram's should completely revamp its present marketing methods, and attempt to reorganize its administrative machinery, it will never be possible, even exerting its best efforts, for Seagram's to obtain sufficient information, with sufficient reliability, to make the affirmations and verifications required by the new New York liquor law. We are ensnared in a double-jawed trap. If we fail to make the affirmations, we may be prohibited from selling in New York.

If we make an affirmation, the affirming officer will subject himself to criminal prosecution if something in the affirmation is later shown to be inaccurate, and it is absolutely impossible to insure accuracy. Under the circumstances, no officer could safely sign such an affirmation.

Seagram's cannot, however, simply ignore the Act and if, as the regulations state, the filings under the Act will be required on the first of December, Seagram's must, at this very moment, establish machinery, however ineffectual, in an attempt to gather the required information. The establishment of such machinery would be extremely expensive. Our corporate organization and our entire sales organization would have to be overhauled, a monumental task, which has little chance for success.

Seagram's, therefore, requests that the enforcement of the Act be enjoined.

(Sworn to by Frederick J. Lind, October 20, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF JOSEPH D. COTLER IN SUPPORT OF MOTION

State of New York,  
County of New York, ss:

JOSEPH D. COTLER, being duly sworn, deposes and says:

That I am a Vice President of McKesson & Robbins, Incorporated. McKesson & Robbins is a Maryland corporation which is authorized to do business in New York. Its principal office is located at 155 East 44th Street, New York, N. Y. This affidavit is made in support of the motion for a temporary injunction and for a stay pending the hearing and determination of that motion.

The Company engages in the wholesaling and to some degree the manufacture of drugs and pharmaceutical products and in selling at wholesale a large variety of liquor, liqueurs, and wines.

In connection with its liquor sales, McKesson operates a liquor import division and sells these imported brands through its large national network of wholesale outlets. McKesson & Robbins does not distill or rectify liquor. Its liquor business consists of the distribution of domestic and imported brands throughout the United States. There are 46 McKesson & Robbins wholesale outlets throughout the country. In New York State McKesson & Robbins hold six wholesale licenses. A large portion of our liquor business is derived from sales in New York.

McKesson & Robbins has been designated as agent for a number of brand owners who are not licensed in New York. It also serves as agent for the foreign brands which it imports.

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Chapter 531 of the New York Session Laws, 1964, has amended the New York ABC Law in several significant respects. In Section 9 of Chapter 531, the State Legislature has imposed upon brand owners and their designated agents the requirement that in addition to the schedules to be filed for prices on all brands to be sold in New York, there must also be filed an affirmation verified by the brand owner or designated agent that the net bottle and case price both to wholesalers and to retailers is no higher than the lowest price at which the same items of liquor were sold, by the brand owner, designated agent, or some "related person" in any other state of the United States during the preceding calendar month.

All of our wholesale outlets are related to each other within the definition of "related person" in the new ABC Law. Before making any sales in New York therefore we must determine at what price each and every brand distributed in New York and distributed by us in some other state is being sold in other states. Paragraph (i) of Section 9 of the new ABC Law requires that in computing this price, reductions must be made to reflect "all discounts, rebates, free goods, allowances, and other inducements of any kind whatsoever." This language is so broad that it is impossible for us to determine what conduct might be considered an "inducement".

Each of our wholesale outlets has considerable autonomy. This is necessary to enable them to compete in their own local markets. Each local McKesson & Robbins wholesaler deals directly with distillers. The price which he pays distillers is not in any way controlled through the home offices of the Company. The prices at which McKesson & Robbins' wholesalers sell to retail is extremely flexible again being dependent upon local competitive conditions. Here again the home office exercises no control over the prices at which our wholesalers sell to retail.

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There are, however, a wide variety of discounts and allowances given. In Texas, Colorado and Minnesota, for example, McKesson wholesalers offer periodic discounts on certain brands. These discounts, often called "post offs" allow retailers to buy at a reduced price for a limited time after which the higher basic rate is reinstated. These discounts may be made available for a period which is not coterminous with the beginning and ending of any specific calendar month.

Even if McKesson & Robbins in its home office could compel our wholesalers scattered throughout the United States to furnish us with a complete list of their prices at all times, it would in fact be impossible for them to determine the price particularly in situations where discount programs extend from one month to the next or where local advertising is employed. It would be impossible for them to allocate advertising to the sale of a specific bottle or case of the brand advertised.

Some of our wholesalers also offered depletion allowances by the Import Division. Here again they would be unable to furnish us with their prices since these allowances offered are not computed until weeks and at times months after the sale is in fact made.

If, for instance, one of our wholesalers offers a quantity discount for a period of say April 16 to June 15 and the retailer purchases ten cases in April, ten in May and ten in June to make the quantity, is the discount translated into a reduction in price during the month of April, May or June? The language of the new New York ABC Law offers no solution for this problem yet if we file an affirmation in New York in which we fail to apply that allowance to what New York may consider the month in which it should be applied, the maker of the affirmation may be criminally prosecuted for making a "false statement" under the provisions of paragraph (j) of Section 9 of the new Law and sanction might be applied against us.

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There are a wide variety of other discount practices which are entirely legal in many states of the United States. At times so-called "free goods deals", point-of-sale promotions, and a wide variety of other allowances are offered through our wholesalers or our Import Division which may be considered "inducements" within the meaning of the New York law. We do not know how to convert such "inducements" into an adjustment in the price of a specific brand at any specific time.

McKesson & Robbins is in the peculiar position of having identifiable "related persons" throughout the country. As we read the new ABC Law, if any McKesson wholesaler in any state sells one single case of a brand of liquor which is also sold by a McKesson wholesaler in New York State the price at which that single case is sold must be taken into account in determining what is the "lowest price in any other state".

McKesson sells an extremely large variety of liquor to retailers in New York State. The mechanical problems which would develop if we compelled all McKesson wholesalers in all states to report the prices at which they are selling any of their brands would impose on McKesson's home office a monumental administrative task. The burden imposed upon McKesson may in fact be greater than that imposed upon any other wholesaler or for that matter any distiller, considering the fact that McKesson deals in so many lines in New York State.

In some instances, McKesson & Robbins acts as designated agents for unlicensed brand owners. In such situations the brand owner may be distributing his brands in other states through wholesalers other than McKesson & Robbins.

As I read the new ABC Law, we would be required to furnish affirmations and verifications only where McKesson & Robbins, or a "related person", sells the same brands in other states. We do not know in these cir-

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cumstances whether we would be considered "related persons" or not. An example of this problem is presented by the methods by which our company distributes the brands of the J. T. S. Brown Company, namely O'Shaughnessy Bourbon and James Walsh Blend. We sell these brands to retailers in the Syracuse and Utica areas. The brand is also handled by other distributors in other states. As designated agents, we are required to file the prices for these brands in New York State. We have no way of knowing what prices are being charged by other distributors in other states. Nor can we tell within the broad definition of a "related person" provided in the new ABC Law whether we or these other distributors in other states do "substantial business" in the sale of brands of the J. T. S. Brown Company and therefore satisfy the definition of "related person".

A similar problem occurs in our sales of Palo Viejo Rum. We import this rum from Destileria Tropical of Puerto Rico. We are designated agents for the sale of the brand in New York State although there are other distributors for this brand in New Jersey, Connecticut and possibly in other states. Whether we do sufficient business in the sale of this rum to qualify as "related persons" we do not know. Nor do we know whether these other distributors in other states would be deemed related persons within the vague definitions supplied by the new ABC Law. We certainly cannot obtain prices from these distributors in other states, yet should New York find that we are related to them and have failed to file the affirmations required by the Act, we may suffer the loss of our licenses in this State.

Should this Act become effective, we will be seriously injured in states which may be completely remote from New York State. As an example, if our wholesaler in Miami, Florida is faced with intense local competition, which competition would compel him to reduce his price

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on certain brands in order to maintain a share of the market, he must first consider the effect of that price reduction upon the New York market before making such reduction effective. And, if a reduced price in Miami would drive down the price at which the same brand could be sold in New York State, in the interests and well-being of our company as a whole, he would be reluctant to make such a reduction. This sacrifice might seriously impair his market position in Miami and may, in fact, drive him out of business. His local competition, however, is perplexed by no such problems. They would be free to regulate their own prices without fear of any extraterritorial effects which might result from their acts. The New York ABC Law may therefore seriously impair the normal operation of McKesson & Robbins wholesalers throughout the country.

We are afraid to sit idly by in the hope that the Court may declare unconstitutional the provisions of the new liquor law which we find impossible to comply with. Since the effective date of that law is the 31st of October, we must act now in preparing as best we can to satisfy its requirements. These preparations will completely disrupt our present method of doing business and will be quite costly as well.

For these reasons, therefore, we request that this Court temporarily enjoin the enforcement of Section 9 of the new ABC Law pending a determination as to its constitutionality. McKesson & Robbins request as well a stay pending the hearing and determination of the request for an injunction. If the stay and the injunction are not granted, McKesson & Robbins will suffer immediate and irreparable injury.

(Sworn to by Joseph D. Cotler, October 21, 1964.)



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IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF RAYMOND REVIT IN SUPPORT OF MOTION

RAYMOND REVIT, being duly sworn, says:

I am the Executive Vice President of Hiram Walker Incorporated (Hiram Walker), the holder of New York wholesale liquor license LL-297 for its premises at 630 Fifth Avenue, New York 20, New York, and of New York wholesale liquor license LL-120 for its premises at 518 James Street, Syracuse, New York, and make this affidavit in support of the motion for the temporary injunction requested in the Order to Show Cause to which this affidavit is annexed and for the Stay pending the determination of such motion also requested in said Order to Show Cause.

I have been an employee and officer of Hiram Walker and its affiliated companies since 1941 and am familiar with the way in which Hiram Walker conducts its business.

Hiram Walker is the national sales company for the Hiram Walker brands produced by its parent company. These brands are sold by it to control states (i. e., states which themselves or through state agencies own and operate retail liquor stores) and to independent wholesalers throughout the United States.

The products thus sold by Hiram Walker in New York and throughout the United States consist of 40 brands in various sizes or 133 separate items and are distributed outside New York State by 105 independent wholesalers spread over twenty-nine states and the District of Columbia with places of business as far distant as Alaska and Hawaii.

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The owner of these brands is not licensed by the New York State Liquor Authority and has therefore designated Hiram Walker its agent to file the price schedules required by Section 101-b of the Alcoholic Beverage Control Law.

The recent amendments to Sec. 101-b.3 impose upon Hiram Walker unreasonable burdens and problems for which there are no solutions no matter what steps we may take in an attempt to comply with their requirements.

The thrust of these amendments is to require that the bottle and case prices listed in the schedules of prices to wholesalers filed by us each month and in the schedule of prices to retailers filed by us and/or our New York wholesalers each month for our 133 separate items of liquor shall be no higher than the bottle and case prices at which each such item was sold by us or by our 105 independent wholesalers during the immediately preceding month anywhere else in the United States and that we file by the 12th of each month a verified affirmation that the prices posted in such price schedules are such lowest prices under penalty in the event of a false statement of fine and imprisonment. The lowest prices to which the affirmation applies are not determined from the invoice prices, but must be reduced to reflect discounts in excess of those in effect in New York and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any purchaser. Adjustments may be made to reflect only differentials in gallonage taxes or fees and in the actual costs of delivery. (Sec. 101-b.3 [i].)

To comply with such requirements we would necessarily have to obtain at the end of each month a report from each of our 105 independent wholesalers of the prices at which he sold each of our 133 separate items during that month and a report of any discounts, re-

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bates, free goods, allowances and other inducements granted by him to each of his customers. It would be impossible for us to obtain such reports.

Each of our 105 wholesalers is independently owned and is not subject to the control or direction of Hiram Walker or of its affiliates. Each such wholesaler provides his own capital and directs the operation of his business. He is selected to distribute our products because of his ability to assume full responsibility for effectively and properly promoting the sale of Hiram Walker products in the territory serviced by him. We cannot require or compel such a wholesaler to provide us with the required information nor would he feel called upon to do so, even though such information may be required to enable us to comply with the laws of the State of New York. The wholesaler's position is that this is his business operated at his risk with his capital and for his account; that much of the information we require is confidential and we have no right to compel or expect its disclosure. He is not going to assume the cost or burden of analyzing his sales of each of our 133 items immediately after the close of each month and forthwith transmitting the required information to us.

The determination of the lowest price at which each of the 133 items is sold in any month outside New York State is further complicated by the requirement that appropriate reductions in the sale prices of such items be made to reflect allowances and other inducements of any kind whatsoever offered or given to any purchaser. Neither Sec. 101-b.3 (c) nor Rule 16 as amended provides criteria as to what are inducements required to be taken into account in determining lowest prices and as to how they are to be evaluated.

Does this vague and indefinite use of the term "inducement" include such usual and permissible activities as providing window displays, advertising materials,

point of sale materials, the use of billboards and local newspapers to advertise the company's products? If so, must the amount used or provided in one state be compared with the amount used or provided in another, and how can the difference be evaluated to reflect an adjustment in price? This additional adjustment required to determine the lowest cost at which our products are sold outside New York State opens a Pandora's box of continual problems. Nevertheless we must verify an affirmation involving such considerations under penalty of fine or imprisonment and subject our licenses to possible suspension or revocation and our bonds to forfeiture.

We are also faced in this connection with the insoluble problem of the sales methods permitted in other states. In New York the maximum quantity discount allowed on sales to retailers is 2% while in other states graduated discounts on quantities up to 100 and more cases are permitted. How can such quantity discounts be properly evaluated in determining the lowest price at which each of our products was sold in another state? Another sales method permitted elsewhere is to offer a combination sale of five, ten or more cases of assorted brands and sizes at a discounted price, without allocating the discount to the respective items making up the combination. Here again we have no means of determining the reduction, if any, which may be required to arrive at the lowest price for each item making up the assortment.

It would appear that each of the 105 independent wholesalers who sell our brands in the normal course of business outside New York State is a "related person" for the reason that a principal or substantial portion of his business is likely to be the sale of a brand or brands of liquor purchased from us even though such wholesalers sell substantial quantities of the products of other suppliers.

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From time to time it becomes necessary or advisable to discontinue a wholesaler as a distributor of our products. In several states prior notice of such discontinuance (which may be as much as three months or more) must be given to the wholesaler. His interest in the company's brands understandably diminishes and in order to dispose of our brands to his best advantage he will sell them at reduced prices. We are then faced with the question as to when such a wholesaler ceases to be a "related person" and when, if ever, these cut-price sales no longer effect the bottle and case prices at which the same items must be sold in New York.

We have another situation where a -wholesaler of our brands located outside this State finds himself in the midst of a price war and for personal reasons decides to maintain his competitive position. It must be remembered that this wholesaler sells other brands which are important to him and his interest is to protect his business. Such wholesaler in order to preserve his competitive position will offer our brands at substantially reduced prices without our knowledge. Nevertheless this independent decision made by an independent wholesaler to protect his business sets the maximum price at which thousands of cases of the same product can be sold in New York.

An even more serious situation can develop in the event of a dispute with an out-of-state wholesaler. This disgruntled wholesaler will necessarily be aware that the lowest prices at which he sells each of our products in his state to wholesalers and to retailers will fix the highest prices at which we can sell such products two months later in New York State. Thus if he threatens to make sales at reduced prices unless his demands are met, we have no alternative but to capitulate.

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As noted above, no adjustments in the lowest prices to be charged in New York are permitted to reflect those varying factors applicable to every enterprise engaged in the same business such as the cost of sales, advertising, warehousing and general overhead such as rent, and clerical and bookkeeping costs nor the differences in such costs which result from differences in volume, efficiency and business acumen. This means that the prices at which our most efficient wholesaler with the lowest operating costs sells our products, whether he be in Texas or Alaska or elsewhere in the United States, control the prices at which our New York wholesalers must sell our products, even if this necessarily requires them to do so at a loss and ultimately discontinue selling our products. Even in those instances of special legislation to meet the emergencies created by global war when price controls were temporarily introduced (which circumstance does not apply to this new legislation), provision was made to enable prices to be adjusted so as not to require that sales be made at below cost and to allow a reasonable profit and in those cases the criteria were the seller's own prices and costs and not those of others. To require otherwise is to take private property without due process of law and without just compensation.

Unless the stay and temporary injunction requested in the Order to Show Cause are granted, we will suffer irreparable injury, particularly if these amendments are ultimately determined to be unconstitutional.

We therefore respectfully request that the relief requested in the Order to Show Cause be granted.

(Sworn to by Raymond Revit, October 27, 1964.)

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF WALTER J. DEVLIN IN SUPPORT OF MOTION

State of New York,  
County of New York, ss:

WALTER J. DEVLIN being duly sworn deposes and says:

1. I am Vice President of The Fleischmann Distilling Corporation, a corporation organized and existing under the laws of the State of New York with its principal office and place of business at 625 Madison Avenue, New York 22, New York.

2. I make this affidavit on behalf of The Fleischmann Distilling Corporation in support of an application for a preliminary injunction under Section 6311 CPLR.

3. As Vice President I am familiar with the marketing methods of the corporation.

4. The Fleischmann Distilling Corporation is a wholly owned subsidiary of Standard Brands Incorporated. It holds a Class A distillers license in New York State.

5. With the exception of sales to military installations, railroads, airlines and ships chandlers, all sales in New York are made to wholesalers. Fleischmann has no financial interest in any of its customers.

6. Fleischmann is engaged in the manufacture, distribution and sale of many types of distilled liquors. The best known of these products are Fleischmann's Preferred Blended Whiskey, Fleischmann's Bottled in Bond Kentucky Straight Bourbon, Fleischmann's Gin, and Fleischmann's Vodka. Fleischmann also imports and sells Black & White Scotch Whiskey. Most of Fleischmann's brands are sold in all states of the United States and the District of Columbia. A substantial amount of its business is derived from sales in New York.

7. Section 9 of Chapter 531 of the Laws of the State of New York, 1964 (effective October 31, 1964) amends the New York Alcoholic Beverage Control Law, Section 101-b,



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Subdivision 3, by adding thereto paragraphs (d) through (k). These new paragraphs lack clarity, require the impossible, and contain requirements which could be fulfilled only by violating the Federal anti-trust laws. If Fleischmann fails to meet the requirements of the new law, it could be denied the right to sell its products in New York.

8. Paragraph (d), added by Section 9 of the new law, would require Fleischmann to file, in conjunction with a schedule of prices to wholesalers in the State of New York, a verified affirmation that its prices to such wholesalers are no higher than the "lowest price" which it, or some "related person," has charged any wholesaler (or state agency in controlled states) in any part of the country at any time during the calendar month immediately preceding the month in which the schedule is filed. This apparently means that the prices contained in the New York price schedule for the month of January, 1965 which must be filed by December 1, 1964 (see Rules of the New York State Liquor Authority, Rule 16, Sections 65.2(f) and 65.7, as amended, effective October 31, 1964) must be no higher than the "lowest price" at which Fleischmann sold to any wholesaler in any part of the country during the month of November, 1964.

9. This means that Fleischmann may not promote a product by granting a temporary nationwide discount, *unless* it is willing and able to additionally grant the same discount on the same product in New York two months after the nationwide discount is offered. It is not certain, but it *may* be that the new law will permit Fleischmann to delay offering an otherwise nationwide discount in New York for two months (e. g., offer it in all states but New York in October and offer it in New York only in December), but this would disrupt any nationwide advertising campaign that might be conducted in conjunction with the special discount.

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10. Similarly, if a product is not selling satisfactorily in some other area of the country—it could be selling very well in New York—Fleischmann cannot, as it has in the past and might wish to do in the future, promote that product in that area by offering a special discount in that area, unless it is willing and able to offer the same discount in New York two months later. This would divert funds from the promotion of other products which might not be selling well in other areas of the country, including New York. Thus, promotional campaigns in other states may have to be drastically altered or abandoned because of the decrees of the State of New York.

11. In addition, paragraph (d) apparently provides that if costs require Fleischmann to raise its price on one of its products, it cannot do so in New York until two months after it has raised the price on that product in every other part of the country. This is not only unjust to purchasers in other states, but it could conceivably subject Fleischmann to charges of unlawful price discrimination. If another state should enact a similar law, Fleischmann would have to stop selling either in that other state or in New York State as it could not possibly comply with the laws of both states at the same time.

12. The requirements of paragraph (d) are made even more difficult by the definition of price in paragraph (i) as added by Section 9 of the new law. Paragraph (i) requires that "In determining the lowest price for which any item of liquor was sold in any other state (but apparently not New York State) \* \* \* appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler \* \* \*". What is meant by "free goods" and "other inducements of any kind whatsoever" is not at all clear. These terms are so

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broad that they could include all forms of advertising including magazine, newspaper, billboard, and point-of-sale material of all kinds including novelties.

13. The type and amount of advertising done in any particular state varies according to the limits imposed thereupon by the different state laws and the particular market conditions. Magazine, newspaper and billboard advertising is always handled directly by Fleischmann. The statute does not clearly state whether such advertising should be considered when determining the "lowest price" that has been charged in other states. Nor does it indicate whether the cost of, say, a billboard advertisement located in an area primarily serviced by one distributor should be considered when determining what that distributor's "price" had been, or whether the cost of such advertisements should be attributed to the "price" in that state as a whole.

14. Similar problems exist in regard to point-of-sale advertising and novelties which, depending upon the size of the market and the number of Fleischmann representatives in the market as well as upon the various state laws, may or may not be given to wholesalers.

15. Even if Fleischmann knew which "free goods" and "other inducements of any kind whatsoever" should be considered when determining its past "prices" to wholesalers in different states, it would be impossible to determine those "prices" by the first of the following month when it must file its New York schedules or even by the twelfth of the month when it must file the required affirmation of "lowest price" (see Rules of the New York State Liquor Authority, Rule 16, Section 65.7(a) as amended).

16. Impossible as it may be to conform to the requirements of paragraph (d), it will be far more difficult to comply with paragraph (f) as added by Section 9 of the new law. Paragraph (f) apparently requires an affirma-

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tion on the part of Fleischmann that each of the prices contained in the schedules of prices filed by its New York wholesaler customers for sales to retailers are no higher than the "lowest price" charged by any of its wholesaler customers, who may satisfy the vague definition of "related person", anywhere in the United States during the month preceding the month in which the wholesalers' schedules are filed.

17. Fleischmann has no control over its wholesaler customers' prices to retailers and has no way of determining what "free goods" or "other inducements of any kind whatsoever" its wholesaler customers might have used to encourage retailers to buy from them. If Fleischmann sought to obtain such information from its wholesalers, they almost certainly would refuse to give it to us. If, however, they did supply such information, Fleischmann would have no way of checking the veracity of the information supplied and, therefore, could not make an affirmation that the prices which the wholesalers say they have charged are in fact the true "prices" including all "inducements". A false affirmation is subject to criminal sanction under paragraph (j) as added by Section 9 of the new law.

18. If Fleischmann were to dictate the prices all its wholesaler customers charged to their retailer customers and maintained a tight control upon the activities of all its wholesaler customers, it is conceivable that it would have sufficient information to enable it to file the affirmation required by paragraph (f). However, such activities on the part of Fleischmann would, without question, violate the Federal antitrust laws as well as the antitrust laws of many states, including New York.

19. Section 7 of Chapter 531 of the Laws of the State of New York, 1964, amends the New York Alcoholic Beverage Control Law, Section 101-b, Subdivision 3, paragraph (a) to require that the schedules to be filed under

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the new amendments must include the "net bottle and case price paid by the seller". Fleischmann Distilling Corporation manufactures and bottles liquor in New York and Illinois and *sells* it to wholesalers. It would be required to furnish this "net bottle and case price" even though it can have no "net bottle and case price" for the liquor it manufactures and bottles itself. It is completely impossible for Fleischmann to comply with this requirement. Rule 16 as amended, effective October 31, 1964 of the New York State Liquor Authority Rules in Section 65.6 apparently excuses Fleischmann and other manufacturers from complying with this section of the new law but the ABC law itself allows no such practical solution. If a "seller" fails to provide this impossible "net bottle and case price", he would nevertheless appear to be violating the new law if not the SLA regulations pertaining to it.

20. If relief from the burdens imposed by the new ABC law, which lacks clarity and requires the impossible, is not given, Fleischmann will be forced to choose between (a) only partially complying with the law and face possible criminal prosecution, or be denied the right to sell in New York, or both; or (b) making a futile attempt to comply with the law and risk being charged with violations of the Federal antitrust laws in addition to the possibility that it might face criminal prosecution in New York or be denied the right to sell in New York, or both; or (c) not selling its products in New York; or (d) not selling its products in any state other than New York.

Deponent, therefore, respectfully requests that this Court temporarily enjoin the enforcement of Section 9 of Chapter 531 of the Laws of the State of New York, 1964, and that part of Section 7 which requires us to furnish the "price paid by the seller" pending a declaration as to the constitutionality of those provisions.

(Sworn to by Walter J. Devlin, October 23, 1964.)

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF D. L. STREET IN SUPPORT OF MOTION

State of Kentucky,  
County of Jefferson, ss:

D. L. STREET, being duly sworn, deposes and says:

I am Executive Vice President of Brown Forman Distillers Corporation, a Delaware corporation with its principal offices in Louisville, Kentucky. Brown Forman's principal business is done in the sale of Kentucky Bourbon Whiskey although other lines are handled as well. Our principal brands are Old Forester and Early Times Kentucky Bourbon Whiskey which we produce ourselves. We also carry Usher's Scotch Whiskey which we import, and the Bols line of domestic and imported liqueurs, gin and vodka.

Brown Forman holds a New York wholesale liquor license but does not sell directly to retailers in New York. It sells brands to nine independent wholesalers. Through these wholesalers Brown Forman sells in New York State approximately 65 different brands of liquor. During our last fiscal year, Brown Forman sold 68,861 cases of our brands in New York State.

I have been an officer of Brown Forman since 1947 and am intimately acquainted with Brown Forman's selling patterns and problems incident to the marketing of our product throughout the United States.

The recent amendment of New York's Alcoholic Beverage Control law, Chapter 531 of the Laws of 1964, Section 9(d), requires that brand owners or wholesalers designated as agents must file, in conjunction with schedules to be filed by them, an affirmation that the bottle and case price of liquor sold to wholesalers is no higher than the lowest price at which the same brand of liquor was sold by the brand owner, wholesaler designated as agent, or by a related person in any other state of the United States. Paragraph (f) of Section 9 requires a similar affirmation as to the wholesale-to-retail price.

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I do not understand what is meant by the term "related person". Both paragraphs (d) and (f) of Section 9 attempt to define this phrase but in their definition they include persons having "exclusive principal or substantial" business in the sale of brands from a single brand owner or wholesaler designated as agent. What is meant by substantial? I do not know. Some of our wholesalers do 30 per cent of their business in the sale of Brown Forman liquors. Is this substantial? The Act is impossibly vague on this point. Yet we are expected to somehow know who our "related persons" are and what is meant by "substantial business". Nevertheless as the Act provides, if we fail to sense what is intended by this vague definition, a person signing the affirmation may run the risk of criminal prosecution for his lack of clairvoyance.

Since it is absolutely impossible for us to determine what the New York Legislature intended in defining "related persons" as those doing "substantial business" in the brands of one brand owner, our only safe course is to assume that every wholesaler regardless of what percentage of his sales are derived from the sale of Brown Forman liquor, must be assumed to be a "related person". If, as it appears we must assume that every wholesaler who deals in our products is a "related person" then it would appear we would have to attempt to keep constant watch over these "related persons" throughout the United States, and the prices at which they sell our brands in order that an officer of the Company can affirm and verify that the prices which we file in New York are no higher than the lowest at which any of these "related persons" are selling.

We have no power to compel any wholesalers to furnish us with their prices and I am sure that not many of them would willingly do so. Moreover if they would be willing to give us such information in the time allowed under the statute, the problem of gathering it throughout the country would be in my opinion absolutely impossible. More-



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over the definition of price contained in the law likewise would make it impossible to obtain the information. Paragraph (i) of Section 9 of the new Act requires that appropriate reductions in price be made for "all rebates, free goods, allowances and other inducements of any kind whatsoever." If price is to include all "inducements" Brown Forman will be unable to determine within the short period of time required by the new Act what in fact is its price to wholesalers—not to mention the price at which the wholesaler sells to retailers. We certainly could not obtain our price to wholesalers within the single day which the State Liquor Authority by its recently amended rules will require. Nor could we obtain a computation of the lowest wholesale to retail price throughout the country within ten days after the end of the month during which those prices were in effect. State Liquor Authority Rule 16, Section 65.2, however, requires us to file affirmations within that period of time.

The impossible difficulty of our dilemma may be illustrated by some of our marketing practices in states other than New York. These marketing methods are completely legal in many states and are absolutely necessary if we are to hold our place in this highly competitive industry. It is customary for Brown Forman to grant depletion allowances from time to time, to wholesalers handling our brands. These depletion allowances, depending upon competitive circumstances will vary at different times and quite frequently will not be coterminous with the beginning or ending of any specific monthly period. Some depletion allowances are conditioned upon first selling a fixed quantity of a brand, and only after that quantity has been sold is the allowance granted. I assume such allowances are "inducements" within the new act and must also be included in determining price, yet it would be impossible for us, in some cases until months later, to determine what in fact was the price at which any given bottle or case of

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whiskey was sold to a wholesaler. Also, in states where such practices are legal we furnish our wholesalers with novelties or give-aways.

Depletion allowances encourage wholesalers to exert extra sales effort in selling our products to retailers, and novelties make the product more attractive to the retailer. All of these devices are operating expenses which must be borne if we are to make our product attractive to wholesalers, retailers and consumers. New York, in demanding that its wholesalers and retailers receive a price equivalent to the lowest price elsewhere and in including such inducements as described above, is in fact demanding that New York wholesalers receive an unearned discount. We do not get from our New York wholesalers services equivalent to those which we receive and for which we pay in the form of discounts, in our sales to non-New York wholesalers, yet we are required to furnish the New York wholesaler with a reduced price reflecting a discount which he has not in fact earned.

Competitive conditions vary widely from state to state. Our sales offices must be ready to respond instantaneously to an attack made on our market position in any given locality. Brown Forman sells to 17 so-called monopoly states at a single fixed price. These "monopoly states" are states in which the sale of liquor is controlled by a state agency. (It is only in our sales to the "monopoly states" that we do not engage in price competition as between sales in different states.) We sell to the "monopolies" at a price slightly lower, i. e., 25¢ to a dollar a case, than that at which we sell to the "open" states. This price difference is a result of reduced costs due to sales of large quantities to a single purchaser and the proportionally reduced sales staff needed for such states. We and other distillers have freely entered into contracts with these monopoly states in which we warrant that the f. o. b. prices at which our brands are offered to those states are

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no higher than the lowest price at which we sell in other states. These warranties, however, do not require us to consider brands, sizes or proofs which are not sold in the monopoly states. Some brands and sizes sold in New York are not sold to the monopolies.

Brown Forman at times conducts special local promotional campaigns. Such campaigns of necessity require local advertising. If we did not have such advertising, wholesalers within that area would refuse to handle our lines. How can such advertising be proportioned and related to the price of our whiskey? Where advertising reaches the monopoly states, it would have to be considered and proportioned—how I do not know—to our sales to those states as well.

I am certain that wholesalers selling our products make special discount arrangements with the retailers. What these arrangements are I do not know. We have no control over such wholesalers and no way of obtaining such information from them. In no state is there presently a requirement to relay back to a brand owner what a wholesaler's price to retail happens to be. Many states of course have price postings yet even here all discount arrangements need not be reflected. In the States of Florida, Louisiana and Texas for instance there is no posting and no control whatsoever over price. We do not and cannot know what is the wholesale or retail price in such states.

Our affirmations however cannot ignore the price at which our brands are sold in the states. Since we can not obtain this information, we will be unable to make the affirmations required, and therefore may be excluded from the New York market. This will severely injure our business, yet it appears to be the commanded result of the new New York liquor amendments. The only alternative would be to have one of our officers make the affirmation in the hope that it has accounted for all

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prices elsewhere and is therefore correct. If however it is subsequently determined that a sale was made somewhere at a price lower than that posted in New York, the affirmation would be false and the officer signing it subject to penal sanctions. It is unfair to ask our company to run these risks particularly where there is a possibility that the new Act may be declared unconstitutional.

There is only one way in which we can be sure of obtaining the sufficient price information so as to be able to comply with the new Act. Brown Forman would have to establish a "flat price" for all Brown Forman's brands throughout the United States and issue orders that under no circumstances could such "flat price" be varied. This would require also the establishment of elaborate policing machinery to ensure compliance. The establishment of such a "flat price" would appear to be a direct violation of federal antitrust laws. Nevertheless New York apparently intended its act to have precisely such extraterritorial effect.

In Section 7 of the new New York Liquor Law, the New York Legislature states that it is part of its purpose in establishing such law to eliminate "the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, or inducements to selected licensees." The New York Act however would appear to compel us to eliminate the granting of inducements not only to New York wholesalers but to those in every other state of the country as well. The New York Act will have an additional extraterritorial effect in placing distillers such as Brown Forman at a distinct competitive disadvantage when competing with brands which are not sold in New York. If for instance Early Times which is sold in both New York and Montana is competing with a local bourbon which is not sold in New York and for some local competitive reason the price

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of the local bourbon is reduced, Brown Forman could not dare to reduce the price of Early Times to meet that competition since it would be required to reduce its Early Times price in New York State by the same amount in the following month.

The way in which the new New York liquor law will serve to destroy Brown Forman's business can also be illustrated by another example. The warranties required by the "monopoly states" require that the price at the exact time of sale, or at the time of sale and for a 30-day period thereafter, be no higher than the lowest price at which other purchasers, at the same time, are paying for the same goods. By contrast, the New York liquor law will now require not a warranty as to the price "*at the time of the sale*" but an affirmation that the price at which New York wholesalers and retailers purchase the goods in any given month is no higher than the lowest price at which wholesalers or retailers *during the preceding month* paid for the same product in states other than New York. This distinction which may on its face seem insignificant, will prevent Brown Forman and all other distillers similarly situated from at any future time increasing the price in New York or in the 17 "monopoly states" of any of their brands which happen to be sold in both New York, and the "monopoly states".

This dilemma may be illustrated by the following example. If during the month of January, the f. o. b. price of Old Forester in both the "monopoly states" and New York is \$45 per case, and for some justifiable reason Brown Forman intends to increase that price during the month of February to \$50 per case in both the monopoly states and New York, it could not do so since although such an increase would be permissible in the monopoly states, New York, in the month of February, would demand the lowest price in the preceding month.

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i. e., \$45 given in other states. If New York pays a price of \$45 during the month of February while the monopoly states pay the \$50 price, such price in New York would be a violation of the warranties given to the monopoly states. They would therefore demand that they also during the month of February receive a price of \$45 per case. We would therefore become hopelessly ensnared by this inescapable action and reaction and chained to a permanent rigid price. These are but some of the far-reaching consequences of New York's recent liquor amendments. I stress again the complete impossibility of our being able to determine who are "related persons", and secondly, being able to determine what is our price, including "other inducements", in our sales to wholesalers and wholesalers' sales of our brands to retailers. We will be irreparably injured if we are not saved from this impossible morass by this Court's enjoining the enforcement of this law before it becomes effective and before we are compelled to do that which we are incapable of doing.

To prevent the irreparable injury to our business which would immediately occur during the pendency of this litigation, it is respectfully requested that the temporary injunction prayed for in the complaint be granted. For the same reason, it is also respectfully requested that, pending the hearing and determination of the motion for a temporary injunction, an appropriate stay be granted restraining the enforcement of the objectionable features of the new law.

(Sworn to by D. L. Street, October 20, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF R. R. HERRMANN, JR., IN SUPPORT OF MOTION  
State of California,  
County of Los Angeles, ss:

R. R. HERRMANN, Jr., being duly sworn, deposes and  
says:

I am Vice President of National Distillers and Chemical Corporation, a Virginia corporation duly qualified to do business in New York and having its principal place of business at 99 Park Avenue, New York, New York, 10016. I am also Assistant General Manager at National Distillers Products Company, the Liquor Division of National Distillers and Chemical Corporation. I am well acquainted with the methods by which National Distillers and Chemical Corporation markets its liquor products throughout the United States.

National Distillers and Chemical Corporation is engaged principally in the liquor and chemical businesses. Its liquor business is conducted in all states of the United States with the exception of Mississippi. Our brands are sold as well in the District of Columbia, United States territorial possessions, and throughout the principal countries of the world. The principal brands sold by the company in the United States market are Old Grand-Dad, Old Taylor, Old Crow, Old Sunny Brook, Hill & Hill, Bond and Lillard and Bellow's American Whiskies, Vat 69 Scotch Whiskey, and Gilbey's Gin and Vodka.

Our company markets its brands through approximately 230 wholesale liquor dealers in the so-called "open" states and to 17 so-called "control" states. Except for sales by our division, Peel Richards, which sells to retailers in the Metropolitan New York area only, National Distillers and Chemical Corporation does not sell directly to retailers.

Most of our brands are sold in New York, although we have some brands, such as Old Sunny Brook, which are not offered to the New York market.



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National Distillers and Chemical Corporation holds a New York wholesale liquor license. Sales to wholesalers in New York are made through two of its divisions, the National Distillers Products Company for domestic brands, and the Munson G. Shaw Co. for imported brands.

The New York market accounts for a substantial part of the company's liquor sales.

Our sales headquarters are at 99 Park Avenue, New York, New York, 10016. Our sales organization covering the open states is divided into four principal regions, namely, the Eastern, Central, Southern and Western. These regions are divided into divisions under the control of division managers. These divisions generally consist of blocks of three or four states. The division managers report to their regional supervisors who, in turn, report to me.

Sales to the "control" states are conducted through a separate division and are supervised by a vice president in charge of such sales, whose headquarters is at 99 Park Avenue, New York, New York.

Orders from wholesalers throughout the country are sent to our New York headquarters for acceptance and approval as to credit. After acceptance, the orders are then sent to our distilleries located in Kentucky and Ohio for shipment.

Chapter 531 of the Laws of New York (1964) significantly amends Section 101-b of the Alcoholic Beverage Control Law. The principal change is found in Section 9 of the new Act, which amends subdivision 3 of Section 101-b of the Alcoholic Beverage Control Law by adding eight new paragraphs. Paragraphs (d) and (f) of Section 9 require that in connection with the schedules to be filed by brand owners or wholesalers designated as agents setting forth the distiller-to-wholesaler price, and in connection with the schedules filed by wholesalers as to wholesaler-to-retailer price, there must be submitted an

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affirmation verified by the brand owner or wholesaler designated as agent that the bottle and case price of liquor sold to wholesalers and the bottle and case price of liquor sold to retailers is no higher than the lowest price at which the same item of liquor is sold anywhere else in the United States. These required affirmations are a new and radical change in New York's price-filing requirements.

It will be impossible for National Distillers to furnish these affirmations.

There is intense competition between companies and brands in the liquor industry. This competition dictates the prices at which our company's brands are sold in various localities. Prices are set at levels which will make them as desirable to the purchasing public as comparable brands of any of our competitors. Generally speaking, however, our case prices to wholesalers in the "open" states and in the District of Columbia are uniform f. o. b. distillery prices. Prices to the Control (Monopoly) States are slightly lower, these states being a different and distinct class of purchasers.

Within each state, and sometimes within markets within a single state, there is a variety of factors which dictates different prices for our brands in each of these markets. Seasonal variations in demand and geographical differences in taste are significant factors in dictating the prices in local markets. In order to meet these local competitive pressures National Distillers offers, where such practices are permissible, a wide variety of discounts and allowances. Local conditions must be met on a regional or divisional level and for this reason regional supervisors and divisional managers are given considerable freedom in the methods they wish to employ in supporting the market position of our brands in their own local markets. Some of these allowances take the form of a flat discount for a quantity purchased or

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an allowance per case for each case sold. Others take the form of depletion allowances which are determined and paid to a wholesaler only after he has sold the goods. Some of our salesmen offer window-display material, counter-display material and consumer novelties. This sort of inducement is termed point-of-sale promotion. It is offered to wholesalers with the hope that our brands will be made more attractive to the retailer and the consumer and thus assist the wholesaler in selling our brands. All of these discounts are intended to, and in fact do, purchase for National Distillers additional sales effort on the part of the wholesalers.

Periodically, accounting is made to the New York headquarters for expenditures for these discounts and allowances and for local advertising costs. Only after these expenditures have been determined and apportioned to case goods sold in a particular market for a specific period of time can our company be in a position to determine what the net bottle and case price for any of our brands would have been for that brand in that specific locality. This would, however, only be an average figure and not valid as to a specific calendar month. Compiling these expenditures may itself take many months.

Another condition in the liquor industry which may dictate a difference in price between two geographical areas is exemplified by problems incident to National's sales of Bellow's Club Whiskey, a brand sold throughout the United States. In the State of Texas, Bellow's Club is sold for a price which is less than that at which it is sold in most other states due to the fact that the brand name is unknown in Texas. In New York, Brand A is a Class "A" brand but in Teaxs it is a Class "B" brand. Since the brand is unknown in Texas it is necessary for National to sell it as a "B" at a lower price in order to make the brand competitive. The State of Texas imposes no restraints whatsoever upon the allow-

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ances or other inducements which are offered to wholesalers to make the brand competitive.

In addition to local sales promotions and sales aids, the company, through its headquarters in New York, formulates and schedules national newspaper and magazine advertising. The extent of this advertising in any market depends upon the extent of our company's brand sales in the market and the need to acquire or maintain a strong sales position. This advertising is paid for from our national advertising budget and may be distinguished from local advertising conducted in specific regions, the cost of which is allocated to the regional expense budget. There is not now, nor could there be established, a breakdown of national advertising which could apportion such expenses to local markets.

Returning again to the new New York Liquor Law, it can be seen that it poses for us insurmountable problems in the light of our marketing methods discussed above.

The new New York Liquor Law requires that, in computing what is the "lowest price" at which our brands are sold in any other state, we make appropriate reductions to reflect all discounts, rebates, free goods, allowances, and other inducements of any kind whatsoever. Presumably all of the discounts, allowances, and advertising discussed above must be taken into account in determining what is the "lowest price".

National Distillers cannot determine at any given time exactly what is the net bottle and case price of one of its brands. What are "inducements of any kind whatsoever"? Presumably, "inducements" would include any assistance offered a wholesaler or retailer, however indirect or slight such assistance might be. The problem is particularly acute in the impossibility of allocating advertising costs to specific case goods, and the impossibility of allocating depletion allowances to goods at a specific period of time.

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Many local promotional campaigns are not specifically timed to coincide with a calendar month. In such situations, where a promotion would extend from the middle of one month to the middle of the next, would advertising in conjunction with that promotion be allocated to sales in the first or second month?

New York, in its new Liquor Law, is attempting to secure from us benefits in the form of lower prices even though, unlike wholesalers and retailers in other states, New York wholesalers and retailers would not be required to expend special sales effort in behalf of our brands.

The very nature of our company's business illustrates that compliance with the affirmation and verification provisions of the new New York Liquor Law is impossible. In an attempt to comply with the new New York Liquor Law, we would have to completely reorganize our selling methods and eliminate entirely legitimate selling practices in other states. This would be necessary in order to simplify information gathering procedures in our efforts to determine what in fact is the "lowest price" at which a brand is sold to wholesalers or retailers during a specific calendar month in states other than New York. Regardless of what machinery we might establish, however, we nevertheless could not maintain sufficient control over all sales to determine prices with sufficient certainty so as to make the affirmations.

The requirement that we take into account "inducements of any kind whatsoever" in determining the lowest price is so broad that we have no way of knowing what indirect or incidental acts by any of our salesmen might be construed as inducement and, as pointed out above, even where such conduct might be labeled as an "inducement," it is impossible for us to translate this into an increment of price.

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In paragraph (f) of Section 9 of the new Liquor Law affirmations and verifications are required as to the wholesaler-to-retailer price. The Act does not, however, state who in fact is required to furnish these affirmations. The State Liquor Authority regulations, Rule 16, §65.07, states that the affirmations as to the wholesaler-to-retailer price must be made by the brand owner or wholesaler designated as agent. If this is the case, an even more impossible task is presented in affirming the wholesaler-to-retailer price than in affirming the distiller-to-wholesaler price. We have absolutely no way of determining what discount arrangements are established between wholesalers and retailers. Nor do we know what retailers might be considered "related persons" as that term is defined in paragraph (f). Wholesalers do not now report to us their prices to retailers. Nor can we compel them to do so.

By dictating a fixed schedule of prices to wholesalers and prices to retailers throughout the country and by establishing sufficient machinery to police those prices, sufficient control might be maintained so as to enable us to make the affirmations required by the new New York Liquor Law. I fear, however, that should we engage in such price control practices, we would certainly be violating federal antitrust laws. The only possible way in which we can comply with the new Liquor Law will expose us to even more severe penalties, if compliance violates federal antitrust statutes, than those already provided in the New York Act.

As a manufacturer of liquor we are confronted with another impossible burden if we are to comply with the requirements of paragraph 3(a) of Section 7 of the new Liquor Law. That section requires that schedules of prices to the wholesalers must include the net bottle and case price "paid by the seller." National Distillers and Chemical Corporation, through its division, National

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Distillers Products Company, most certainly is the seller, but as manufacturers, we have no net bottle and case price and therefore it is completely impossible for us to furnish such a price in our schedules.

The new New York Liquor Law by its very terms is so vague and ambiguous that it is impossible for us to understand the meaning of some of its sections and therefore impossible for us to comply with the requirements of those sections. One of the most difficult problems is that presented by the definition of "related persons" found in paragraphs (d) and (f) of Section 9 of the new Liquor Law.

In determining for purposes of the affirmations and verifications, what is the lowest price in any other state, our company is required to consider only those sales made by ourselves as either brand owner or designated agent, or by a "related person." "Related person" is defined as

"any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands."

We do not understand who satisfies the second definition offered for the term "related person." What is meant by the words "substantial business"? The statute is impossibly vague on this point.

If we are required to make such a determination and if we fail to include one wholesaler who in our opinion



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is not a "related person," and it is later determined that that wholesaler is selling at prices lower than those posted in New York and for some reason is considered by the State Liquor Authority to be a "related person," the person making the affirmation will subject himself to the penal provisions of the new Liquor Law. The company may, in addition, lose its license as provided in Section 10 of the new Liquor Law. This is a severe penalty which may be imposed upon us even though the company makes every possible effort to comply with the statute.

It will be impossible to satisfy the demands of the new Liquor Law. In addition, preparations to comply with it will involve considerable expense to our company and will dictate a complete reorganization of our selling divisions.

To force National Distillers and Chemical Corporation to attempt to comply with the new Liquor Law where that law may be declared unconstitutional and where we will suffer immediate and irreparable injury by the enforcement of that law, would be an unfair and unnecessary burden to impose upon us.

We therefore respectfully request that this Court temporarily enjoin the enforcement of the new Liquor Law pending a declaration as to the constitutionality of that law. National Distillers and Chemical Corporation also respectfully requests that the Court grant a temporary restraining order pending the hearing and determination of the injunctive action.

(Sworn to by R. R. Herrmann, Jr., October 20, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF IRA R. SCHATTMAN, JR., IN SUPPORT OF MOTION  
State of New York,  
County of Queens,

IRA R. SCHATTMAN, Jr., being duly sworn, deposes and says:

That he is Secretary of Standard Food Products Corporation, a New York State Corporation, with offices at 45-11 33rd Street, Long Island City, New York.

The said corporation (hereinafter called "Standard") sells a large variety of distilled spirits and wines to retailers in the Metropolitan New York area.

Standard has 41 suppliers of distilled spirits, domestic and imported. Over 50% of our business, on the basis of total sales, is done with one of our suppliers, in the sale of brands manufactured and/or owned by such supplier, approximately 7% in the sale of brands of another supplier, approximately 6% in the sale of still another supplier. There is a range from less than 1% to 7% in the sale of the brands of various suppliers.

Standard's suppliers are domestic distillers, importers of distilled spirits produced abroad, and primary distributors or agents of suppliers not licensed in this State.

The new New York Liquor Law (Chapter 531 of the Laws of 1964) in Section 9, paragraph (f), requires that in conjunction with the schedules filed by wholesalers in New York State as to their prices to retailers, there must also be filed an affirmation that the bottle and case prices appearing in such schedules are no higher than the lowest prices at which a brandowner, wholesaler designated as agent or "related person" sells the same items to any retailer anywhere else in the United States.

Paragraph (g) of Section 9 requires an affirmation by the person filing the schedule that he does not sell to retailers in any other state at prices lower than those offered in New York.

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I do not understand what will be required of Standard in order to satisfy the requirements of paragraphs (f) and (g) of the new Liquor Law.

Paragraph (f) requires the filing of the aforementioned affirmation, but does not state precisely who is responsible for its preparation and submission. The recently amended Rule 16 of the State Liquor Authority Rules and Regulations, attempts to clarify this problem by delegating to the brandowner or wholesaler designated as agent the responsibility for filing the affirmation required by (f). If the State Liquor Authority interpretation is correct, Standard, if it is a "related person," need not file under paragraph (f), yet cannot sell until the brandowner or wholesaler designated as agent has filed. If Standard however is not a "related person," it would file its own affirmation under paragraph (g) and would be free to sell to retailers, provided it does not sell outside of New York State, at any price it chooses regardless of the price at which the same brand may be sold in some other state. Standard must therefore decide whether it is a "related person" placing it under the purview of (f) or not a "related person" and therefore subject to the directions of paragraph (g). The new New York Liquor Law, however fails to define "related person" with sufficient clarity to enable us to make this determination.

Paragraph (f) includes in its definition of "related person," those doing "substantial business" in the sale of a brand or brands of a single brandowner. What is "substantial business"? By doing over 50 per cent of our business in the sale of brands from one supplier, is Standard related to them? Is Standard related to another supplier since it does approximately 7 per cent of its business in the sale of their brands? What is

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the cut-off point? Standard cannot answer these questions and therefore cannot tell whether it is or is not a "related person."

Rule 16 of the State Liquor Authority regulations, in Section 65.7(e) requires, in an affirmation filed under paragraph (g), that the person filing the affirmation must include a representation that he is not a "related person." If Standard improperly classifies itself as "not a related person," and files an affirmation under paragraph (g), it may be criminally prosecuted if the classification is incorrect.

Standard may in fact be a "related person" as to some suppliers but not related as to others. If Standard is considered a "related person," the price at which it sells in New York would be controlled by a maximum price ceiling established by the price at which some complete stranger is selling in another state. Standard could not sell at all in New York if for some reason the brandowner or agent, over whom Standard has no control, failed to file the required affirmations. If, however, Standard is not a "related person," it would be free to set its own price.

It is impossible for Standard under the vague guidelines provided by the new liquor law to determine whether or not it is a "related person." This determination will significantly affect our method of doing business in New York. An erroneous determination on our part may subject us to penal sanctions. For these reasons, we respectfully request that the motion for a temporary injunction be granted.

(Sworn to by Ira R. Schattman, Jr., October 22, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF FRANK T. HYPPTS IN SUPPORT OF MOTION

State of New York,  
County of New York, ss:

FRANK T. HYPPTS, being duly sworn, deposes and says:

1. I reside at 40 West 63rd Street, New York, New York 10023. I am a marketing and management consultant and serve as an organizer and director of marketing-management programs for the identification and solution of marketing and economic problems related to the sales volume and profit progress of client companies.

2. I received a B.S. degree in Economics and Marketing, Wharton School of Finance and Commerce, University of Pennsylvania, 1925; A.M. 1927; Ph.D. 1929.

3. I am the author of:

"Desk Top Reference," Comparative Market Facts (Consumption, Wholesalers, Retailers, Consumers, Distillers), Distilled Spirits Industry, A. Asch, Inc., N. Y., N. Y., 1958.

"Combination Thinking for Progress Urged," Twenty-Sixth Annual Wine and Spirits Number, The Journal of Commerce, N. Y., November 20, 1958.

"How Markets Will Be Made in 1954," Louisville Advertising Club, Magazine, Louisville, Kentucky, 12/4/53.

"Analyzing the Dynamics of Local Markets," American Marketing Association, Workshop, N. Y., N. Y. 11/3/52.

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"Market Survey—an Economic Telescope Designed to Bring Management Closer to Markets,"  
The Seagram Spotlight, N. Y., N. Y., 4/1/48.

4. From 1925-1937 I was an Assistant Professor of Marketing and Merchandising, Wharton School of Finance and Commerce, University of Pennsylvania, Philadelphia, Pennsylvania. Courses taught in undergraduate and graduate schools included Marketing, Economics, Advertising.

5. From 1938 to 1946 I served as a Marketing Expert, Department of Revenue, Commonwealth of Pennsylvania, Harrisburg, Pennsylvania; Marketing Analyst, Radio Corporation of America, Inc., Camden, New Jersey; Director of Marketing, Brown and Tarcher, Inc. (Advertising), New York, New York; Vice President, Norris and Elliott, Inc., New York, New York (consultants); Director of Marketing Research, Member of Management Committee, Schenley Distillers Corp., New York, New York.

6. From 1946 to 1958 I was consultant and director of A. Asch Incorporated, New York, New York (Advertising), division of Distillers Corporation Seagram, Ltd., New York, New York.

7. I organized and directed, as a division of the Asch organization, a continuous marketing research program in support of the marketing operations of the various sales divisions of Distillers Corporation Seagram, Ltd.

These embraced Browne-Vintners Co., Calvert Distillers Corp., Carstairs Bros. Distilling Co., Inc., Frankfort Distillers Corp., Seagram Distillers Corp. My duties included an analysis of economic and competitive forces working for or against the sales program of the companies' various brands.

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8. Since 1958, I have been president of the Coordinated Marketing-Management Corporation, New York, New York, an independent marketing analysis firm, and I currently am the director of marketing management surveys and installations for client companies.

9. From 1937 to date I have had an intimate knowledge of the industry and have been thoroughly conversant in its pricing, marketing and sales practices.

#### *I. Conclusion*

1. Based upon my aforesaid intimate knowledge of and experience in the distilling industry since 1937, its products, markets, and competitive situation, it is my conclusion that competition within the industry at both the manufacturing and primary distributing levels is now and should continue to remain for the foreseeable future of such a vigorous quality as to allow natural market forces alone to prevent anti-competitive price discrimination in distilled spirits in New York after the repeal of Section 101-c of the Alcoholic Beverage Control Law.

2. My studies of the competitive problems of the industry from coast to coast which embrace 320 test cities do not reveal market factors within the industry either at the manufacturing or primary distribution level that could lead to a reasonable concern that this industry, more than any other line of business enterprise, will be able to resort to "monopolistic and anti-competitive practices" in an effort to thwart the effects of the repeal of section 101-c.

3. In the preparation of this affidavit I have read and analyzed Sections 8 and 9 of the New York Session Laws, 1964, Ch. 531. I understand section 9 generally prohibits manufacturers and wholesalers of distilled spirits from



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selling liquor in New York in the next succeeding month at a price higher than the lowest price at which the same brand was sold elsewhere in the United States during the immediately preceding month.

4. I understand section 8 states a desire that fundamental principles of price competition should prevail within the industry and that consumers in New York should not pay unjustifiably higher prices for liquor than consumers in other states. To this end the repeal of Section 101-c of the Alcoholic Beverage Control Law is effected. I further understand section 8 to question whether industry members might not in the future attempt to thwart the effect of repeal of section 101-c by engaging in "monopolistic and anti-competitive practices." It is my understanding that section 8 finds the maximum price provisions of section 9 to be necessary "to forestall" such practices.

5. I have analyzed the five study papers of the Moreland Commission to Study the Alcoholic Beverage Control Law. In none of these studies is any definitive analysis made or data presented relative to the distribution costs of distillers or wholesalers by product lines sold, or the markets they service—by states or areas within a state—that could be considered a standard of reference for imposing maximum prices on distiller sales to wholesalers or wholesaler sales to retailers as enacted in the law.

6. The repeal of section 101-c will generally serve to place the distribution of liquor within a free market and pricing context. Given this situation, there is no justification from the economic standpoint for placing maximum price restrictions in the form of the lowest price charged elsewhere upon manufacturers and primary distributors of distilled spirits. Furthermore it is

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my opinion there is not a present or reasonably foreseeable danger that the industry structure is or will be so constituted as to engender anti-competitive conditions which would serve to nullify the desire of section 8 that "fundamental principles of price competition" should prevail within the industry. These conclusions are the result of the following discussion.

## II. Discussion

1. Since the end of World War II radical shifts have taken place in consumer demand and acceptance of various types of distilled spirits, indicating the intense competition between distillers who seek to win the public's acceptance of particular types of whisky. These changes have drastically affected the market position held by individual distillers relative to the type or types of whiskey they feature in their marketing efforts.

2. Illustrative of these changes is the situation in New York State, which currently accounts for 12 per cent of national consumption. In 1954 spirit blends accounted for 52.3% of New York consumption. This fell to but 37.9% in 1963. The importation of Scotch whisky, which amounted to 11.6% of consumption in 1954, rose to 17.3% in 1963. Vodka, which amounted to but 1.2% of the market in 1954, rose to 5.9% in 1963. Bonded whisky, on the other hand, which accounted for 4.6% of the market in 1954, fell to but 1.5% in 1963. Importers and distributors of Scotch whiskies in New York have shown in the last ten years the greatest increase in the gallonage consumption of liquor over any other type of whisky sold in the New York market.

3. Other changes in the consumption pattern in New York are shown in the chart attached as Appendix A.

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4. Incident to these major changes in consumer demand and acceptance of various generic types of liquors have been the related changes in the market position of the various brands sold by suppliers. For example, a comparison of 1954 and 1963 sales figures of items among the seventy leading brands shows the following shifts in preference:

Cases (thousands)			Brand Name	Marketer	Product Type
1954	—	1963			
7,250	—	7,350	Seagrams' 7 Crown	Seagrams	Blend
1,250	—	2,325	Old Crow	National	Bourbon
2,725	—	2,225	Imperial	Hiram Walker	Blend
655	—	1,525	Ancient Age	Schenley	Bourbon
715	—	1,925	Jim Beam	James B. Beam	Bourbon
1,250	—	1,475	Early Times	Brown-Forman	Bourbon
825	—	1,300	Fleischmann's Pfd.	Fleischmann	Blend
60	—	1,125	J & B	Paddington	Scotch
N.A.	—	1,300	Cutty Sark	Buckingham	Scotch
2,950	—	1,800	Calvert Reserve	Seagrams	Blend

(Source: Business Week, McGraw Hill Publishing Co., N. Y., N. Y. Issue: 1/9/54, 2/22/64. For other examples see Appendix B.) Indicated in this comparative analysis is the continuing competitive nature of the industry as gauged by the types of product sold, the entry of new competitors and the rivalry between small and large distillers. This is the opposite of any monopolistic condition.

5. Also to be considered in any discussion of competitive marketing influences is the so-called private label

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brand, which in New York is a brand of liquor that is solely owned by one retailer. These brands are in direct competition with nationally marketed brands. Currently, they account for 12% of the sales of New York retailers who feature such private brands. (Source: Marketing Research Division, A. Asch Co., February 3, 1964.)

6. Not only is competition found among the various types and brands of liquor; the industry is also subject to competition from the beer and wine industries. The 15 distilling companies analyzed by the First National City Bank, N. Y. according to their "net income after taxes to net assets" (Appendix C) had total sales, including excise taxes, of \$3.316 millions or only 31 per cent of consumer spending on all alcoholic beverages in 1962, which amounted to \$10,665 millions. (Source: Monthly Economic Letter, First National City Bank, N. Y., N. Y., June 1964, p. 69.)

7. Today it is generally recognized that in any industry 60 per cent of the forces working for or against the profitable progress of a business is beyond management control because of varying economic, social, political and psychological factors. In the distilling industry, these outside forces are compounded by extensive state and federal taxation and restrictive operating regulations. On the average in 1963 federal and state taxes ranged from 45.8 per cent of the retail price of a fifth of whiskey (Colorado) to 61.3 per cent (Kentucky). In New York State it is 50.7 per cent. (Source: Tax Council of the Alcoholic Beverage Industry, N. Y., N. Y., 1964.) The result is that such outside forces dominate 85 per cent of the industry's ability to meet the multi-faceted demands imposed upon it by the free market.

8. It is the considered opinion of many who have studied the industry that the combined effect of the increasing regulatory and tax burdens on the industry is creating a con-

[fol. 246]

dition akin to economic as opposed to legislative prohibition. The condition is evidenced by the continual decline of the industry's share of the consumer's spendable income. Distilled spirits expenditures as a per cent of disposable income after federal and state taxes accounted for 1.4 per cent of such expenditures in 1939, but by 1962 they had fallen to 0.6 per cent of such expenditures (U. S. Department of Commerce, Survey of Current Business, 1939-1962).

9. With regard to profits for the past ten years (1954-1964) the distilling industry has fallen below the rate of "net income after taxes to net assets" compared with the average of leading manufacturing corporations.

Net Income after Taxes Versus  
Net Assets Percentage

Year	Distilling	Average all manufacturing
1954	6.3	12.4
1955	6.4	15.0
1956	6.3	13.9
1957	7.3	12.8
1958	7.0	9.8
1959	7.9	11.6
1960	7.4	10.6
1961	8.1	9.9
1962	7.8	10.9
1963	8.0	11.5

(Source: Economic Department, First National City Bank, N. Y., N. Y., 1964.)

10. In 1963, 53 different industries among the 65 industries (3,934 corporations) analyzed—from autos and trucks (19.6% return) to lumber and wood products (8.1%)—had higher earnings than distilling. (Source: *Id.*)

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11. Of singular significance in the distilling industry, unlike other industries in the private sector of our national economy, is the fact that each market (state) is non-competitive with other markets or states. A distiller, wholesaler, retailer or sales person must be licensed to sell in the state. The license grants no sales privilege beyond the geographical and political boundaries of the state. Each market entered requires a separate license which obligates the licensee to operate in accordance with the particular regulations of the licensing state.

12. The 50 national markets are sharply divided in their treatment of liquor marketing and pricing practices. Seventeen states, the so-called monopoly states, buy distilled spirits from the manufacturers and sell to the public through state-owned package stores.

13. The remaining states are known as the "open" or "license" states. Sixteen of these permit distillers, importers and wholesalers to price in response to traditional free market factors.

14. Sixteen other states impose some restrictions upon pricing at the wholesale or retail levels, but none so regulates the distiller to wholesaler transaction. Only one state, Kansas, has previously employed maximum price restrictions. It is my understanding that the Kansas act has been declared unconstitutional. Several in this group of 16 require distillers and wholesalers to file a schedule of their prices, but this requirement does not impinge upon the right to set the price as the seller may choose.

15. Still other states in this group of 16 require wholesalers and retailers to abide by a state-imposed minimum markup. The purpose for this system is to prevent price wars which disrupt competition and encourage harmful social practices.

[fol. 248]

16. Of equal significance is the existence of non-competitive marketing areas within a state that make up the total sales potential and per capita consumption within the state. Thus the consumption pattern of New York City (Scotches, cocktails, premium products) differs radically from that of the industrial area of Buffalo (blends, bourbons, Canadian). The result is that within each market (state) distillers/wholesalers are confronted with different competitive problems reflective of conditions prevailing in each particular area of the market. This is evidenced by acceptance or rejection of particular brands, rising or falling employment, increase or decrease in weekly earnings, changes in retail sales trends, changes in size of bottle purchased (pint, fifth, quart), change in price-line bought.

17. Mandated in the new liquor pricing act is the requirement that any higher marketing costs (advertising, promotion, selling) necessary in any market other than New York to create sales in such markets must be given a dollar and cents expression in the form of a lower case price to all New York wholesalers and/or retailers. This applies regardless of (i) the competitive conditions that produced the higher costs, (ii) the case volume sold, or (iii) the non-competitive nature of the sale in relation to sales to New York wholesalers. This concept is the product of inverted thinking, namely that the ability of distillers and wholesalers selling in New York to service their markets profitably is premised upon the effectiveness or ineffectiveness of a distiller or wholesaler in selling his brands in markets which are non-competitive with New York.

18. The new legislation also ignores cost variations by requiring New York "related person" wholesalers to sell to retailers at a price no higher than the lowest price charged by "related person" wholesalers elsewhere in the United States. Differences in operating expenses between New York wholesalers and those elsewhere are also disregarded.



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19. In 1963 upstate New York wholesalers had operating expenses of 11.57% of net sales and net profits (before taxes) of .66% of such sales. Metropolitan New York City wholesalers had expenses of 10.88% and net profits (before taxes) of .76%. Nationally the figures averaged 9.94% and 1.29% respectively. In Florida expenses were only 7.34% and profits 1.52%; in Chicago 8.71% and 1.11% and in Missouri 9.63% and 1.11%. (See Appendix D.)

20. From these figures it can be seen that wholesalers in other states, with lower operating expenses, will be able to reduce prices to a level which would seriously impair or eliminate the profit margins of New York wholesalers forced to give the same price. A statute devised to ensure a high degree of competition but which has such a result has no support in economic theory. Forcing New York "related person" wholesalers to sell at a price no higher than the lowest charged by independent "related person" wholesalers in other states without regard to differences in operating expenses and profits can only result in eliminating the marginal New York wholesaler and thus reducing the vigor of competition by narrowing the number of participants. In this respect the new act would appear to be economically self-defeating.

21. The continual and ever-changing nature of these marketing problems emphasizes the inability of any distiller/wholesaler to control sufficiently his distribution costs in markets remote from the New York market. The maintenance of a fixed sales budget policy which will ensure that the distillers'/wholesalers' "price" (as defined by Section 9 of Ch. 531) in other states will not fall below the prevailing price for their products in New York is impracticable. Since it is axiomatic that distillers/wholesalers must come to grips with their competitive problems as they find them in particular markets, it follows that no one pricing policy will serve to solve all sales problems in all markets.

[fol. 250]

22. The very complexities of the problems inherent in distillers'/wholesalers' efforts to out-perform competition place a premium on the need of distillers'/wholesalers to be flexible in their operations if they are to meet and solve the problems posed by competition. The need of distillers'/wholesalers to readjust their sales budgets to meet the requirements of markets is ever present.

23. Hence, for New York State to mandate that all such adjustments in distillers'/wholesalers' sales strategies and sales budgets must be reflected in allocations of such adjustments to the price distillers may charge New York wholesalers or wholesalers may charge New York retailers is tantamount to the usurpation of managerial prerogatives and responsibilities of such distillers'/wholesalers.

24. To penalize management for decisions made to meet competitive problems in markets that are remote and non-competitive to New York because such decisions may be expressed in higher sales costs to the distiller is contrary to any known principle related to our free enterprise society.

25. This legislation, failing as it does to consider marketing, cost and pricing problems that prevail in this industry as in any other, does not accord with current anti-trust theory nor does it seem possible for the industry to comply with it without drastically altering its operational methods.

(Sworn to by Frank T. Hypps, October 25, 1964.)

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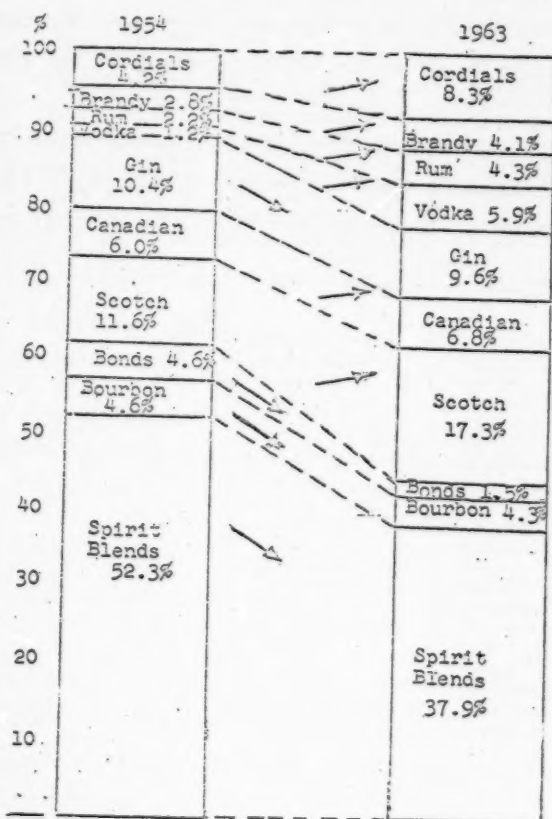
[fol. 251]

APPENDICES A, B, C AND D, ANNEXED TO  
AFFIDAVIT OF FRANK T. HYPPS

APPENDIX A  
NEW YORK STATE  
DISTILLED SPIRITS

Percentage Change

Shares of Total  
by  
Product Types  
1954 vs. 1963



Source: "Annual Statistical Review," The Distilled Spirits Institute, 1964.

A comparison of the Leading Whisky Brands, 1954 versus 1963, shows the intensity of brand competition and shifts in consumer acceptance of the various product types.

Among the 20 Leading Brands in 1954 six brands disappeared from the list by 1963. All but one brand changed sales rank. Five of the 1954 brands showed case decreased in relation to 1963. Nine brands in 1963 showed increases over their 1954 sales. Six brands not among the 20 Leading Brands in 1954 appeared among the leaders in 1963.

In 1954 the 20 top-selling brands were: Blends 10; Canadians 2; Bonds 1; Bourbons 7. In 1963 the 20 leaders were: Blends 9; Canadians 2; Bourbons 7; Scotches 2.

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## APPENDIX B

## LEADING WHISKY BRANDS - 1954 VERSUS 1963

	Rank	Cases	Brand Name	Marketer	Product Type
1954	1	7,250	Seagram's 7 Crown	Seagram	Blend
	2	2,950	Calvert Res.	Seagram	Blend
	3	2,800	Schenley Res.	Schenley	Blend
	4	2,725	Imperial	Hiram Walker	Blend
	5	1,750	Corby's	Hiram Walker	Blend
	6	1,450	Seagram's V.O.	Seagram	Canadian
	7	1,400	Canadian Club	Hiram Walker	Canadian
	8	1,250	Early Times	Brown-Forman	Bourbon
	9	1,250	Old Crow	National	Bourbon
	10	1,100	P.M.	National	Blend
	11	1,050	Carstairs	Seagram	Blend
	12	1,025	Four Roses	Seagram	Blend
	13	900	Old Stag	Schenley	Bourbon
	14	875	Paul Jones	Seagram	Blend
	15	850	Old Sunny Brook	National	Bourbon
	16	825	Fleischmann's Pfd.	Fleischmann	Blend
	17	725	J. W. Dant	Schenley	Blend
	18	715	Jim Beam	James B. Beam	Bourbon
	19	660	Echo Spring	Schenley	Bourbon
	20	655	Ancient Age	Schenley	Bourbon

(Source: Business Week, Issue 1/9/54)

1963	1	7,350	Seagram's 7 Crown	Seagram	Blend
	2	2,450	Seagram's VO	Seagram	Canadian
	3	2,325	Canadian Club	Walker	Canadian
	4	2,225	Old Crow	National	Bourbon
	5	2,225	Imperial	Walker	Blend
	6	1,925	Jim Beam	Beam	Bourbon
	7	1,800	Calvert Extra	Seagram	Blend
	8	1,525	Ancient Age	Schenley	Bourbon
	9	1,500	Schenley Reserve	Schenley	Blend
	10	1,475	Early Times	Brown-Forman	Bourbon
	11	1,350	Ten High	Walker	Bourbon
	12	1,300	Fleischmann Pfd.	Fleischmann	Blend
	13	1,300	Cutty Sark	Buckingham	Scotch
	14	1,275	Kessler	Seagram	Blend
	15	1,250	Corby's Reserve	Walker	Blend
	16	1,200	Old Taylor	National	Bourbon
	17	1,200	Four Roses	Seagram	Blend
	18	1,125	J & B	Paddington	Scotch
	19	875	Kentucky Gentleman	Barton	Bourbon
	20	850	Old Sunny Brook	National	Blend & Bourbon

(Source: Business Week, Issue 2/22/64)

## APPENDIX C

Distilling Companies Included in Studies  
of First National City Bank, New York,  
New York (Average Annual Percentage Rates  
of Net Income after Taxes to Net Assets of  
Leading Manufacturing Corporations, 1963)

Distillers Corporation Seagrams, Ltd., Montreal, Canada  
National Distillers & Chemical Corporation, New York, N. Y.  
Hiram Walker - Gooderham & Worts, Ltd., Walkerville,  
Ontario, Canada  
Schenley Industries, Inc., New York, N. Y.  
American Distilling Company, New York, N. Y.

Publicker Industries, Incorporated, Philadelphia, Pa.  
Heublein, Inc., Hartford, Conn.  
Brown-Forman Distillers, Louisville, Ky.  
Beam (James B.) Distilling Company, Chicago, Ill.  
Barton Distilling Co., Chicago, Ill.

Glenmore Distilleries Company, Louisville, Ky.  
Taylor Wine Co. Inc., Hammondport, N. Y.  
Arrow Liqueurs Corporation, Detroit, Michigan  
Jacquin (Charles) et Cie., Inc., Philadelphia, Pa.  
Mohawk Liqueur Corporation, Detroit, Michigan

DISTILLERS - NET GAIN TO NET WORTH

	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	% Return Net Worth	(Thous.) Annual Sales
<u>SCHENLEY INDUSTRIES INC.</u>				
1963	10,518	273,447	3.846%	400,395
1962	7,457	269,331	2.769%	370,495
1961	12,372	267,923	4.617%	405,936
1960	8,045	261,690	3.074%	351,549
1959	8,085	269,047	3.005%	450,039
1958	14,271	252,443	5.653%	458,781
1957	10,966	241,030	4.549%	469,989
1956	8,439	234,401	3.599%	404,162
1955	6,117	229,799	2.661%	411,732
1954				

DISTILLERS CORPORATION  
SEAGRAMS, LTD.

1963	34,259	464,850	7.369%	864,522
1962	31,613	446,775	7.075%	820,412
1961	30,944	459,392	6.735%	794,234
1960	28,367	411,551	6.892%	768,229
1959	27,131	398,651	6.805%	731,353
1958	25,617	383,847	6.621%	704,530
1957	25,401	376,574	6.745%	746,380
1956	23,023	362,464	6.351%	732,138
1955	31,002	354,311	8.749%	735,679
1954				

NATIONAL DISTILLERS &  
CHEMICAL CORPORATION

1963	22,811	376,469	6.059%	766,866
1962	24,226	374,576	6.467%	775,067
1961	23,132	368,721	6.273%	748,053
1960	21,415	357,662	5.987%	580,172
1959	26,347	308,175	8.549%	578,299
1958	20,103	295,416	6.804%	524,310
1957	23,024	287,067	8.0204%	538,525
1956	22,633	275,510	8.214%	543,100
1955	14,618	256,912	5.689%	500,192
1954				
1953				



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	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	% Return Net Worth	(Thous.) Annual Sales
<u>HIRAN WALKER-COODERHAM &amp; WORTS, LTD.</u>				
1953	29,644	253,073	11.685%	473,723
1952	27,706	240,507	11.520%	469,237
1951	23,363	231,114	11.406%	448,859
1950	25,050	220,135	11.379%	440,125
1949	23,694	210,633	11.248%	412,122
1953	21,845	203,143	10.753%	384,023
1957	22,478	193,762	11.452%	393,122
1956	21,079	186,617	11.295%	370,923
1955	19,321	177,175	10.857%	341,223
1954				
1953				

AMERICAN DISTILLING COMPANY

1953	2,832	26,825	10.743%	27,037
1952	2,699	25,089	10.757%	26,243
1951	2,481	23,486	10.563%	25,453
1950	2,275	21,960	10.359%	24,013
1949	1,963	20,495	9.602%	22,522
1953	1,646	19,256	8.563%	19,713
1957	1,495	18,293	8.170%	18,823
1956	1,333	17,550	7.595%	17,332
1955	1,133	17,213	6.611%	16,237
1954				
1953				

PUBLICKER INDUSTRIES INCORPORATED

1953	417	85,213	.4893%	143,222
1952	( 2,505 )	83,116	( 2.944% )	128,821
1951	89	83,866	.1001%	124,353
1950	2,027	92,131	2.2001%	123,363
1949	( 2,113 )	90,821	( 2.326% )	113,297
1953	( 1,955 )	93,891	( 2.0802% )	132,632
1957	( 139 )	93,420	( .1441% )	140,572
1956	293	97,171	.3015%	159,535
1955	( 1,809 )	97,155	( 1.851% )	143,501
1954				
1953				

(fol. 257)

	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	% Return Net Worth	(Thous.) Annual Sales
<u>HEUBLEIN, INC.</u>				
1963	5,022	30,931	16.236%	122,234
1962	4,407	28,453	15.483%	116,142
1961	3,814	25,692	14.845%	108,221
1960	3,556	22,892	15.533%	103,169
1959	2,063	14,728	14.007%	87,647
1958	2,130			87,839
1957	2,411			82,064
1956	2,177			68,544
1955 (10 mo)	687			37,222
1954				
1953				

BROWN-FORMAN DISTILLERS CORP.

1963	7,285	58,859	12.377%	121,078
1962	6,647	53,403	12.446%	111,207
1961	5,526	43,397	11.418%	106,907
1960	4,403	41,139	10.714%	101,697
1959	3,567	38,329	9.305%	92,445
1958	2,423	36,029	6.712%	91,476
1957	2,530	34,939	7.2303%	97,383
1956	2,940	33,722	8.718%	77,720
1955	2,646	30,675	8.625%	70,791
1954				
1953				

BEAM (JAMES B.) DISTILLING COMPANY

1963	5,903	33,854	17.436%	86,447
1962	5,476	30,350	18.042%	85,082
1961	4,873	25,394	19.189%	82,462
1960	4,276	21,144	20.223%	79,452
1959	3,819	17,753	21.511%	69,790
1958	3,151	14,130	22.300%	64,794
1957	2,451	11,368	21.566%	62,590
1956	2,244	9,153	26.695%	52,547
1955	1,807	7,118	25.386%	39,826
1954				
1953				

[fol. 258]

	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	% Return Net Worth	(Thous.) Annual Sales
<u>BARTON DISTILLING COMPANY</u>				
1953	1,461	13,756	10.620%	79,931
1952	1,902	12,434	15.295%	70,533
1951	1,323	10,566	17.251%	68,472
1950	1,458	8,548	17.056%	72,590
1959	1,271	7,166	17.736%	55,885
1953	615	5,753	10.620%	39,691
1957				
1956				
1955				
1954				
1953				

GLENMORE DISTILLERS COMPANY

1953	1,235	32,835	3.761%	67,846
1952	880	32,232	2.725%	65,353
1951	1,637	32,109	5.093%	69,773
1950	1,558	31,310	5.007%	71,261
1959	1,737	30,442	5.705%	70,869
1958	1,837	29,342	6.260%	69,125
1957	1,520	23,122	5.405%	67,976
1956	826	27,116	3.046%	58,521
1955	722	26,804	2.693%	54,193
1954				
1953				

TAYLOR WINE CO. INC.

1953	1,623	12,030	13.491%	17,036
1952	1,354	10,763	12.644%	13,720
1951	1,071	9,653	11.083%	11,437
1950	851	8,650	9.826%	10,034
1959		7,854		
1958	838			9,043
1957	649			7,797
1956				
1955				
1954				
1953				

[fol. 259]

	(Thous.) Net Income (after taxes)	(Thous.) Net Worth	% Return Net Worth	(Thous.) Annual Sales
<u>ARROW LIQUERERS CORPORATION</u>				
1953	441	3,977	11.374%	15,224
1952	402	3,520	11.420%	13,906
1951	366	3,193	11.462%	12,623
1950		2,894		
1949	343	2,674	12.827%	12,520
1948	285	2,374	12.005%	11,788
1947	374	2,147	17.415%	12,912
1946	339	1,613	18.646%	12,057
1945	280	1,517	18.457%	10,034
1944				
1943				

JACQUIN (CHARLES) ET CIE, INC.

1953	279	1,707	16.344%	9,807
1952	260	1,510	17.218%	8,744
1951	183	1,106	17.45%	7,436
1950	149	903	16.50%	7,047
1949	92	754	12.201%	6,322
1948	71			6,270
1947	65			6,106
1946	51			5,020
1945				
1944				
1943				

KONAWY LIQUER CORPORATION

1953	269	2,035	12.901%	7,764
1952	170	1,944	8.744%	7,083
1951	211	1,803	11.702%	7,339
1950	203	1,451	13.990%	7,283
1949	141	1,305	10.804%	6,011
1948	138	1,104	12.50%	5,802
1947	162	1,014	17.948%	5,823
1946	136	973	13.977%	5,059
1945	105	845	12.426%	3,906
1944				
1943				

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[fol. 260]

APPENDIX D

Annual Survey of Operations

1963

New York - p. 4

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.

[fol. 261]

This report is based on 17 questionnaires representing 20 establishments. The comparisons are based on all firms reporting in 1963 and on the average firms of the same sales volume classifications as those reporting from your state.

[fol. 262]

Balance Sheet Comparisons

	1963			
	<u>All Firms Reporting</u>	<u>Range of Experience</u>	<u>New York</u>	<u>Range of Experience</u>
Cash	5.89	.04 - 32.04	7.36	.79 - 18.55
Receivables-Net	30.60	.00 - 64.85	24.04	16.22 - 33.48
Inventories	46.54	7.01 - 89.36	55.96	36.56 - 70.00
Warehouse Receipts	4.36	.00 - 65.76	.68	.60 - 8.79
Other Current Assets	1.64	.00 - 45.63	2.26	.00 - 17.67
<u>Total Current Assets</u>	<u>89.03</u>	<u>34.02 - 99.82</u>	<u>90.30</u>	<u>67.50 - 97.56</u>
Investments	3.55	.00 - 65.52	2.69	.00 - 29.29
Funds	.13	.00 - 8.01	.04	.00 - .51
Fixed Assets-Net	5.79	.00 - 34.51	5.79	1.23 - 17.81
Intangibles	.26	.00 - 8.40	.17	.00 - 1.97
Deferred Items	1.24	.00 - 22.98	1.01	.00 - 3.42
<u>Total Assets</u>	<u>100.00</u>		<u>100.00</u>	
Current Liabilities	56.07	5.11 - 103.08	54.87	24.95 - 81.00
Fixed Liabilities	6.23	.00 - 87.67	2.73	.00 - 16.64
Deferred Income	.18	.00 - 10.18	.01	.00 - .15
Reserves	.24	.00 - 9.05	.18	.00 - 3.52
<u>Total Liabilities</u>	<u>62.72</u>	<u>5.11 - 158.80</u>	<u>57.79</u>	<u>31.56 - 81.00</u>
<u>Net Worth</u>	<u>37.28</u>	<u>(58.00) - 99.13</u>	<u>42.21</u>	<u>19.00 - 68.44</u>
<u>Total Liab. &amp; Capital</u>	<u>100.00</u>		<u>100.00</u>	

Selected Ratios

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>New York</u>	<u>Range of Experience</u>
Current Ratio	1.59	.67 - 110.48	1.70	1.65	1.12 - 3.33
Stock Turnover	6.66	2.22 - 16.14	6.86	5.93	4.49 - 8.11
Closing Inv. as a Per Cent of Beg. Inv.	100.52	45.03 - 343.00	100.81	103.07	87.49 - 128.31
Return on Net Worth	12.28	(2587.11) - 177.02	12.75	6.93	.07 - 15.93
Return on Total Assets	4.58	(16.32) - 54.14	5.19	2.92	.00 - 7.25



[fol. 263]

Income Statement Comparisons

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>New York</u>	<u>Range of Experience</u>
Net Sales	100.00		100.00	100.00	
Cost of Goods Sold	88.77	68.63 - 96.80	88.71	87.77	86.25 - 88.89
Gross Profit	11.23	3.20 - 31.37	11.29	12.23	11.11 - 13.75
Operating Expenses	<u>9.94</u>	1.77 - 33.45	9.87	<u>11.57</u>	10.25 - 12.51
Net Operating Profit	<u>1.29</u>	(5.43)- 7.68	1.42	<u>.66</u>	(.15)- 2.12

Operating Expense Comparisons

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>New York</u>	<u>Range of Experience</u>
Total Expenses	9.942	1.767 - 33.454	9.868	11.568	10.252 - 12.514
Administrative	2.869	1.212 - 13.148	3.001	3.602	2.830 - 4.506
Selling	3.914	.109 - 14.642	3.716	4.496	3.627 - 5.395
Shipping	1.374	.000 - 5.690	1.455	1.757	1.111 - 2.340
Warehouse	.699	.000 - 2.356	.637	.755	.000 - 1.429
Occupancy	.521	.033 - 2.787	.538	.602	.256 - 1.050
Other	.565	(.438)- 2.232	.521	.356	.065 - .914

[fol. 264]

Operating Expenses (Detailed)

	1963			1963	
	All Firms	New York		All Firms	New York
<u>Administrative Expenses</u>	<u>2.869</u>	<u>3.602</u>	<u>Occupancy Expenses</u>	<u>.521</u>	<u>.602</u>
Executive Salaries	.662	.950	Salaries & Wages	.018	.016
Executive Travel	.082	.126	Real Estate Taxes	.043	.030
Office Salaries	.867	1.032	Depreciation on Bldgs.	.056	.083
Office Supplies	.111	.188	Rent	.243	.313
Office Equipment	.120	.119	Insurance on Buildings	.019	.026
Business Licenses	.063	.129	Light, Heat & Power	.057	.071
Postage	.028	.055	Repairs & Maintenance	.041	.050
Telephone & Telegraph	.122	.045	Outside Storage	.017	.002
Assoc. Dues & Subscriptns.	.070	.060	Other	.025	.009
Gen'l. Insurance, Bonding	.146	.165			
Contributions	.040	.032			
Legal and Auditing	.088	.097			
Other	.470	.504			
<u>Selling Expenses</u>	<u>3.914</u>	<u>4.496</u>	<u>Warehouse Operation Expense</u>	<u>.699</u>	<u>.755</u>
Managers & Supervisors	.547	.610	Salaries & Wages	.595	.677
Salesmen's Salaries	2.602	3.088	Supplies & Equipment	.043	.044
Salesmen's Travel Exp.	.252	.458	Other	.061	.034
Advertising & Promotion	.350	.237			
Other	.163	.103			
<u>Shipping Expenses</u>	<u>1.374</u>	<u>1.757</u>	<u>Other Expenses</u>	<u>.565</u>	<u>.356</u>
Salaries & Wages	.831	.526	Interest Paid	.260	.130
Common & Contract Del.	.166	1.030	Loss From Bad Debts	.126	.067
Rental of Equipment	.103	.031	Personal Property Taxes	.083	-
Oper. & Maint. of Equipmt.	.161	.105	Other	.096	.159
Depreciation of Equipment	.067	.034			
Other	.046	.031			

[fol. 263]

Sales, Profits and Expenses Per Invoice(Based on returns from 14 firms in your State)

	<u>\$ Per Invoice</u>		
	<u>All Firms</u>	<u>Comp.</u>	<u>New York</u>
Net Sales	116.27	110.26	98.15
Gross Profit	13.16	12.40	12.17
Total Expenses	11.64	10.95	11.42
Net Profit	1.52	1.53	.75
Selling Expenses	4.57	4.12	4.39
Salesmen's Salaries	3.06	2.56	3.04
Salesmen's Travel Expense	.26	.35	.44
Shipping & Delivery Expense	1.63	1.68	1.70
Occupancy Expense	.63	.61	.60
Warehousing Expense	.63	.69	.77
Warehousing Salaries	.69	.59	.68
Administrative Expense	3.25	3.23	3.56
Office Salaries	1.06	.93	1.07
Other Expenses	.73	.62	.40

[fol. 266]

Employment Statistics

	<u>All Firms</u>	<u>Comp.</u>	<u>New York</u>
Total Employees	<u>50.3</u>	<u>50.6</u>	<u>54.5</u>
Sales Employees	19.8	20.3	26.4
Shipping & Delivery Employees	9.6	9.4	5.5
Warehouse & Occupancy Employees	7.2	7.4	6.4
Gen'l & Administrative Employees	13.7	13.5	16.2
Sales Per Employee (\$ 000)	134.7	136.9	137.7
Sales Per Sales Employees (\$ 000)	341.3	347.4	284.0
Sales Per Shipping and Delivery Employee (\$ 000)	708.7	742.1	1371.6
Sales Per Warehouse & Occupancy Employee (\$ 000)	943.6	919.7	1171.6
Sales Per General & Administrative Employee (\$ 000)	494.8	511.4	462.6

[fol. 267]

## Annual Survey of Operations

1963

New York City - p. 4

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.

This report is based on 4 questionnaires  
representing 8 establishments. The comparisons  
are based on all firms reporting in 1963 and on the average  
firms of the same sales volume classifications as those report-  
ing from your state.

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[fol. 269]

Balance Sheet Comparisons

	1963			
	<u>All Firms Reporting</u>	<u>Range of Experience</u>	<u>New York City</u>	<u>Range of Experience</u>
Cash	5.89	.04 - 38.04	8.63	8.02 - 10.34
Receivables - Net	20.60	.00 - 64.85	33.26	21.49 - 34.54
Inventories	46.54	7.01 - 89.36	53.72	52.92 - 62.81
Warehouse Receipts	4.36	.00 - 66.76	-----	-----
Other Current Assets	1.64	.00 - 45.63	.53	.00 - 1.95
<u>Total Current Assets</u>	<u>89.03</u>	<u>34.02 - 99.82</u>	<u>96.19</u>	<u>94.64 - 98.86</u>
Investments	3.55	.00 - 65.52	.59	.00 - .95
Funds	.13	.00 - 8.01	--	-----
Fixed Assets - Net	5.79	.00 - 34.51	2.72	1.14 - 3.62
Intangibles	.26	.00 - 8.40	.02	.00 - .02
Deferred Items	1.24	.00 - 22.98	.48	.00 - 3.99
<u>Total Assets</u>	<u>100.00</u>		<u>100.00</u>	
Current Liabilities	56.07	5.11 - 103.08	75.63	70.21 - 85.25
Fixed Liabilities	6.23	.00 - 87.67	-----	-----
Deferred Income	.18	.00 - 10.18	-----	-----
Reserves	.24	.00 - 9.05	-----	-----
<u>Total Liabilities</u>	<u>62.72</u>	<u>5.11 - 158.80</u>	<u>75.63</u>	<u>70.21 - 85.25</u>
<u>Net Worth</u>	<u>37.28</u>	<u>(58.80) - 99.13</u>	<u>24.37</u>	<u>14.75 - 29.79</u>
<u>Total Liabilities and Capital</u>	<u>100.00</u>		<u>100.00</u>	



[fol. 270]

Selected Ratios

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>New York City</u>	<u>Range of Experience</u>
Current Ratio	1.59	.67 - 110.48	1.53	1.27	1.15 - 1.36
Stock Turnover	6.66	2.33 - 16.14	6.66	7.01	5.93 - 9.58
Closing Inv. as a Per Cent of Beg. Inv.	100.52	45.03 - 343.00	102.80	134.60	116.91 - 143.11
Return on Net Worth	12.28	(2587.11) - 177.02	12.57	28.54	25.70 - 59.79
Return on Total Assets	4.58	(16.32) - 54.14	3.38	6.96	4.55 - 10.37

Income Statement Comparisons

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>New York City</u>	<u>Range of Experience</u>
Net Sales	100.00		100.00	100.00	
Cost of Goods Sold	88.77	68.63 - 96.80	88.84	88.36	87.28 - 89.91
Gross Profit	11.23	3.20 - 31.37	11.16	11.64	10.09 - 12.72
Operating Expenses	<u>9.94</u>	1.77 - 33.45	9.98	<u>10.88</u>	9.23 - 11.73
Net Operating Profit	<u>1.29</u>	(5.43) - 7.68	1.18	<u>.76</u>	(.27) - 2.02

[fol. 271]

Operating Expense Comparisons

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>New York City</u>	<u>Range of Experience</u>
Total Expenses	9.942	1.767 - 33.454	9.984	10.875	9.226 - 11.733
Administrative	2.869	1.212 - 13.148	2.756	2.526	1.212 - 3.472
Selling	3.914	.109 - 14.642	4.088	4.900	4.528 - 5.051
Shipping	1.374	.000 - 5.690	1.382	1.718	1.589 - 1.795
Warehouse	.699	.000 - 2.356	.685	.786	.550 - .955
Occupancy	.521	.033 - 2.787	.483	.419	.272 - .492
Other	.565	(.438) - 2.232	.590	.527	.104 - .957

[fol. 272]

Operating Expenses (Detailed)

	1963			1963	
	All Firms	New York City		All Firms	New York City
<u>Administrative Expenses</u>	<u>2.869</u>	<u>2.526</u>	<u>Occupancy Expenses</u>	<u>.521</u>	<u>.419</u>
Executive Salaries	.662	.450	Salaries & Wages	.018	-
Executive Travel	.082	.089	Real Estate Taxes	.043	.024
Office Salaries	.867	.647	Depreciation on Bldgs.	.058	.017
Office Supplies	.111	.084	Rent	.243	.221
Office Equipment	.120	.062	Insurance on Buildings	.019	-
Business Licenses	.063	.050	Light, Heat & Power	.057	.049
Postage	.028	.028	Repairs and Maintenance	.041	.045
Telephone & Telegraph	.122	.105	Outside Storage	.017	.056
Assoc. Dues & Subscripts.	.070	.017	Other	.025	.007
Gen'l. Insurance, Bonding	.146	.085			
Contributions	.043	.024	<u>Warehouse Operation</u>		
Legal & Auditing	.088	.058	<u>Expense</u>	<u>.699</u>	<u>.766</u>
Other	.470	.827	Salaries & Wages	.595	.723
<u>Selling Expenses</u>	<u>3.914</u>	<u>4.900</u>	Supplies & Equipment	.043	.041
Managers & Supervisors	.547	.329	Other	.061	.022
Salesmen's Salaries	2.602	3.706	<u>Other Expenses</u>	<u>.565</u>	<u>.527</u>
Salesmen's Travel Exp.	.252	.352	Interest Paid	.260	.007
Advertising & Promotion	.350	.319	Loss From Bad Debts	.126	.061
Other	.163	.194	Personal Prop'ty. Taxes	.083	-
<u>Shipping Expenses</u>	<u>1.374</u>	<u>1.717</u>	Other	.096	.459
Salaries & Wages	.831	1.479			
Common & Contract Deliv.	.166	.023			
Rental of Equipment	.103	.169			
Oper. & Maint. of Equipmt.	.161	.011			
Depreciation of Equipmt.	.067	.008			
Other	.046	.007			

[fol. 273]

Sales, Profits and Expenses Per Invoice(Based on returns from 3 firms in your city)

	\$ Per Invoice		
	<u>All Firms</u>	<u>Comp</u>	<u>New York City</u>
Net Sales	116.27	122.96	131.93
Gross Profit	13.16	13.81	15.53
Total Expenses	11.64	12.29	13.49
Net Profit	1.52	1.52	2.04
Selling Expenses	4.57	5.09	6.45
Salesmen's Salaries	3.06	3.53	4.99
Salesmen's Travel Expense	.26	.22	.37
Shipping & Delivery Expense	1.63	1.69	2.19
Occupancy Expense	.63	.61	.48
Warehousing Expense	.83	.86	.87
Warehousing Salaries	.69	.72	.78
Administrative Expense	3.25	3.22	2.39
Office Salaries	1.06	1.11	.98
Other Expenses	.73	.82	1.11

EMPLOYMENT STATISTICS

	<u>All Firms</u>	<u>Comp.</u>	<u>New York City</u>
Total Employees	<u>50.3</u>	<u>122.0</u>	<u>169.3</u>
Sales Employees	19.8	49.7	50.7
Shipping & Delivery Employees	9.6	22.4	27.0
Warehouse & Occupancy Employees	7.2	16.7	11.3
Gen'l & Administrative Employees	13.7	33.2	20.3
Sales Per Employee (\$ 000)	134.7	137.9	146.0
Sales Per Sales Employee (\$ 000)	341.3	344.6	319.3
Sales Per Shipping and Delivery Employee (\$ 000)	708.7	725.9	599.1
Sales Per Warehouse and Occupancy Employee (\$ 000)	943.6	1036.9	1427.3
Sales Per General and Administrative Employee (\$ 000)	494.8	514.5	795.6

[fol. 275]

Annual Survey of Operations

1963

Florida - p. 4

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.

This report is based on 12 questionnaires  
representing 17 establishments. The comparisons  
are based on all firms reporting in 1963 and on the average firms of  
the same sales volume classifications as those reporting from your  
state.



[fol. 277]

Balance Sheet Comparisons

	1963			
	<u>All Firms Reporting</u>	<u>Range of Experience</u>	<u>Florida</u>	<u>Range of Experience</u>
Cash	5.89	.04 - 38.04	5.02	.90 - 16.59
Receivables - Net	30.60	.00 - 64.85	20.42	10.47 - 30.98
Inventories	46.54	7.01 - 89.36	63.69	40.13 - 80.47
Warehouse Receipts	4.36	.00 - 66.76	2.01	.00 - 12.86
Other Current Assets	1.64	.00 - 45.63	.33	.00 - 1.90
<u>Total Current Assets</u>	<u>89.03</u>	<u>34.02 - 99.82</u>	<u>91.47</u>	<u>75.73 - 98.24</u>
Investments	3.55	.00 - 65.52	.29	.00 - 2.96
Funds	.13	.00 - 8.01	.03	.00 - .29
Fixed Assets - Net	5.79	.00 - 34.51	6.38	.10 - 16.61
Intangibles	.26	.00 - 8.40	.80	.00 - 6.84
Deferred Items	1.24	.00 - 22.98	1.03	.00 - 3.95
<u>Total Assets</u>	<u>100.00</u>		<u>100.00</u>	
Current Liabilities	56.07	5.11 - 103.08	69.94	12.50 - 89.04
Fixed Liabilities	6.23	.00 - 87.67	2.14	.00 - 6.56
Deferred Income	.18	.00 - 10.18	1.06	.00 - 11.35
Reserves	.24	.00 - 9.05	.20	.00 - 1.41
<u>Total Liabilities</u>	<u>62.72</u>	<u>5.11 - 158.80</u>	<u>73.34</u>	<u>12.50 - 94.95</u>
<u>Net Worth</u>	<u>37.28</u>	<u>(58.80) - 99.13</u>	<u>26.66</u>	<u>5.05 - 87.50</u>
<u>Total Liabilities and Capital</u>	<u>100.00</u>		<u>100.00</u>	

Selected Ratios

	<u>All Firms</u>	<u>Range of Experience</u>	1963		
			<u>Comp</u>	<u>Fla.</u>	<u>Range of Experience</u>
Current Ratio	1.59	.67 - 110.48	1.64	1.31	.94 - 7.70
Annual Rate of Stock Turnover	6.66	2.33 - 16.14	6.94	6.76	4.97 - 9.25
Closing Inv. as Per Cent of Beg. Inventory	100.52	45.03 - 343.00	104.68	106.11	68.63 - 158.18
Return on Net Worth	12.28	(2587.11)- 177.02	13.96	28.01	9.25 - 110.01
Return on Total Assets	4.58	(16.32)- 54.14	4.78	7.47	1.48 - 15.41

Income Statement Comparisons

	<u>All Firms</u>	<u>Range of Experience</u>	1963		
			<u>Comp</u>	<u>Fla.</u>	<u>Range of Experience</u>
Net Sales	100.00		100.00	100.00	
Cost of Goods Sold	88.77	68.63 - 96.80	89.05	91.14	89.58 - 96.80
Gross Profit	11.23	3.20 - 31.37	10.95	8.86	3.20 - 10.42
Operating Exp.	<u>9.94</u>	1.77 - 33.45	9.63	<u>7.34</u>	5.86 - 9.14
Net Operating Profit	<u>1.29</u>	(5.43)- 7.68	1.32	<u>1.22</u>	(4.79)- 3.44

(fol. 279)

Operating Expense Comparisons

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp</u>	<u>Fla.</u>	<u>Range of Experience</u>
Total Operating Expenses	9.942	1.767 - 33.454	9.627	7.342	5.861 - 9.144
Administrative	2.869	1.212 - 13.148	3.012	2.564	1.329 - 3.497
Selling	3.914	.109 - 14.642	3.540	2.725	2.276 - 4.096
Shipping	1.374	.000 - 5.690	1.442	1.131	.693 - 1.911
Occupancy	.521	.033 - 2.787	.500	.413	.230 - .997
Warehouse	.699	.000 - 2.356	.643	.294	.000 - .992
Other (including Bad Debts)	.565	(.438)- 2.232	.490	.215	.038 - .474

[fol. 280]

Operating Expenses (Detailed)

	1963			1963	
	All Firms	Fla		All Firms	Fla.
<u>Administrative Expenses</u>	<u>2.869</u>	<u>2.564</u>	<u>Occupancy Expenses</u>	<u>.521</u>	<u>.413</u>
Executive Salaries	.662	.617	Salaries & Wages	.018	.006
Executive Travel	.082	.106	Real Estate Taxes	.043	.015
Office Salaries	.867	.600	Depreciation on Bldgs.	.058	.072
Office Supplies	.111	.107	Rent	.243	.225
Office Equipment	.120	.066	Insurance on Buildings	.019	.011
Business Licenses	.063	.103	Light, Heat & Power	.057	.043
Postage	.028	.012	Repairs & Maintenance	.041	.020
Telephone & Telegraph	.122	.115	Outside Storage	.017	.005
Assoc. Dues & Subscriptns.	.070	.070	Other	.025	.001
Gen'l. Insurance, Bonding	.146	.141			
Contributions	.040	.038	<u>Warehouse Operation</u>		
Legal and Auditing	.088	.059	<u>Expense</u>	<u>.699</u>	<u>.234</u>
Other	.470	.530			
<u>Selling Expenses</u>	<u>3.914</u>	<u>2.725</u>	Salaries & Wages	.595	.260
Managers & Supervisors	.547	.699	Supplies & Equipment	.043	.020
Salesmen's Salaries	2.602	1.464	Other	.061	.014
Salesmen's Travel Exp.	.252	.206	<u>Other Expenses</u>	<u>.565</u>	<u>.215</u>
Advertising & Promotion	.350	.295	Interest Paid	.260	.097
Other	.163	.061	Loss From Bad Debts	.126	.041
			Personal Prop'ty. Taxes	.083	.097
<u>Shipping Expenses</u>	<u>1.374</u>	<u>1.131</u>	Other	.096	.020
Salaries & Wages	.831	.706			
Common & Contract Delvry	.166	.006			
Rental of Equipment	.103	.180			
Oper. & Maint. of Equipmt.	.161	.120			
Depreciation of Equipmt.	.067	.065			
Other	.046	.054			

[fol. 281]

Sales, Profits and Expenses Per Invoice  
(Based on returns from 11 firms in your State)

	\$ Per Invoice		
	<u>All Firms</u>	<u>Comp.</u>	<u>Florida</u>
Net Sales . . . . .	116.27	108.02	122.15
Gross Profit . . . . .	13.16	11.88	10.48
Total Expenses . . . . .	11.64	10.46	9.14
Net Profit . . . . .	1.52	1.42	1.34
Selling Expenses . . . . .	4.57	3.81	3.48
Salesmen's Salaries . . . . .	3.06	2.26	1.75
Salesmen's Travel Expense . . .	.26	.41	.27
Shipping & Delivry. Expense . . .	1.63	1.64	1.62
Occupancy Expense . . . . .	.63	.56	.51
Warehousing Expense . . . . .	.83	.68	.28
Warehousing Salaries . . . . .	.69	.59	.24
Administrative Expense . . . . .	3.25	3.20	2.88
Office Salaries . . . . .	1.06	.91	.82
Other Expenses . . . . .	.73	.57	.37

Employment Statistics

	<u>All Firms</u>	<u>Comp.</u>	<u>Florida</u>
Total Employees . . . . .	<u>50.3</u>	<u>49.7</u>	<u>40.3</u>
Sales Employees . . . . .	19.8	19.4	14.4
Shipping & Delivery Employees . . . . .	9.6	9.2	10.1
Warehouse & Occupancy Employees . . . . .	7.2	7.7	5.0
General & Administrative Employees . . . . .	13.7	13.4	10.8
Sales Per Employee (\$ 000). . . . .	134.7	141.3	174.0
Sales Per Sales Employee (\$ 000) . . . . .	341.3	365.2	487.0
Sales Per Shipping and Delivery Employee (\$ 000) . . . . .	708.7	774.9	694.4
Sales Per Warehouse and Occupancy Employee (\$ 000) . . . . .	943.6	915.4	1402.7
Sales Per General & Administrative Employee (\$ 000) . . . . .	494.8	519.9	649.4

[fol. 283]

Annual Survey of Operations

1963

Illinois - Chicago - P. 5

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.



[fol. 284]

This report is based on 10 questionnaires  
representing 13 establishments. The comparisons are based  
on all firms reporting in 1963 and on the average firms of the same  
sales volume classifications as those reporting from your state.

[fol. 285]

Balance Sheet Comparisons

	1961		1962	
	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)
Cash	5.48	6.08	5.83	4.64
Receivables - Net	29.66	29.37	30.38	35.13
Inventories	46.16	45.97	47.78	49.23
Warehouse Receipts	4.06	7.80	3.86	1.88
Other Current Assets	3.88	1.64	1.67	1.39
<u>Total Current Assets</u>	<u>89.24</u>	<u>90.86</u>	<u>89.52</u>	<u>92.27</u>
Investments	4.04	3.17	3.83	1.72
Funds	.22	.41	.20	.28
Fixed Assets - Net	5.18	5.11	5.38	5.27
Intangibles	.46	.13	.19	.14
Deferred Items	.86	.32	.88	.32
<u>Total Assets</u>	<u>100.00</u>	<u>100.00</u>	<u>100.00</u>	<u>100.00</u>
Current Liabilities	56.66	64.78	55.04	59.38
Fixed Liabilities	5.46	6.36	5.13	5.87
Deferred Income	.08	-	.14	-
Reserves	.34	.22	.43	.34
<u>Total Liabilities</u>	<u>62.54</u>	<u>71.36</u>	<u>60.74</u>	<u>65.59</u>
Net Worth	37.46	28.64	39.26	34.41
<u>Total Liabilities and Net Worth</u>	<u>100.00</u>	<u>100.00</u>	<u>100.00</u>	<u>100.00</u>

	1963			
	All Firms Reporting	Range of Experience	Ill. (Chi.)	Range of Experience
Cash	5.89	.04 - 38.04	5.62	.32 - 10.14
Receivables - Net	30.60	.00 - 64.85	34.24	31.26 - 41.05
Inventories	46.54	7.01 - 89.36	45.89	35.05 - 57.60
Warehouse Receipts	4.36	.00 - 66.76	5.93	.00 - 23.08
Other Current Assets	1.64	.00 - 45.63	1.60	.00 - 3.20
<u>Total Current Assets</u>	<u>89.03</u>	<u>34.02 - 99.82</u>	<u>93.28</u>	<u>85.46 - 98.46</u>
Investments	3.55	.00 - 65.52	1.57	.00 - 6.24
Funds	.13	.00 - 8.01	.57	.00 - 6.00
Fixed Assets - Net	5.79	.00 - 34.51	4.31	.00 - 1
Intangibles	.26	.00 - 8.40	.08	.00 -
Deferred Items	1.24	.00 - 22.98	.19	.00 - 1.69
<u>Total Assets</u>	<u>100.00</u>		<u>100.00</u>	
Current Liabilities	56.07	5.11 - 103.08	65.43	38.63 - 89.23
Fixed Liabilities	6.23	.00 - 87.67	2.65	.00 - 9.37
Deferred Income	.18	.00 - 10.18	.00	.00 - .01
Reserves	.24	.00 - 9.05	.40	.00 - 3.99
<u>Total Liabilities</u>	<u>62.72</u>	<u>5.11 - 158.80</u>	<u>68.48</u>	<u>42.62 - 94.09</u>
Net Worth	<u>37.28</u>	<u>(58.80) - 99.13</u>	<u>31.52</u>	<u>5.91 - 57.38</u>
<u>Total Liabilities and Capital</u>	<u>100.00</u>		<u>100.00</u>	

[fol. 286]

Selected Ratios

	1961			1962		
	<u>All Firms</u>	<u>Comp.</u>	<u>Ill. (Chi.)</u>	<u>All Firms</u>	<u>Comp.</u>	<u>Ill. (Chi.)</u>
Current Ratio	1.58	1.51	1.40	1.63	1.50	1.55
Annual Rate of Stock Turnover	6.36	6.24	7.33	6.57	6.57	7.77
Closing Inventory as a Per Cent of Beginning Inventory	102.28	100.16	111.30	103.63	106.04	95.88

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>Ill. (Chi.)</u>	<u>Range of Experience</u>
Current Ratio	1.59	.67 - 110.48	1.55	1.43	1.00 - 2.45
Annual Rate of Stock Turnover	6.66	2.33 - 16.14	6.62	7.84	4.24 - 10.88
Closing Inventory as a Per Cent of Beginning Inventory	100.52	45.03 - 343.00	101.57	106.69	96.92 - 147.48
Return on Net Worth	12.28	(2587.11)- 177.02	11.90	14.97	(19.22)- 98.32
Return on Total Assets	4.58	(16.32)- 54.14	3.79	4.72	(3.03)- 8.30

[fol. 287]

Income Statement Comparisons

	1961			1962		
	<u>All Firms</u>	<u>Comp</u>	<u>Ill. (Chi.)</u>	<u>All Firms</u>	<u>Comp</u>	<u>Ill. (Chi.)</u>
Net Sales	100.00	100.00	100.00	100.00	100.00	100.00
Cost of Goods Sold	88.73	89.01	90.14	88.75	88.96	90.22
Gross Profit	11.22	10.99	9.86	11.25	11.04	9.78
Operating Expenses	9.91	9.83	8.84	9.81	9.78	8.73
Net Operating Profit	1.31	1.11	1.02	1.44	1.26	1.05

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>Ill. (Chi.)</u>	<u>Range of Experience</u>
Net Sales	100.00		100.00	100.00	
Cost of Goods Sold	88.77	68.63 - 96.80	88.94	90.18	88.96 - 92.31
Gross Profit	11.23	3.20 - 31.37	11.06	9.82	7.69 - 11.04
Total Operating Expenses	<u>9.94</u>	1.77 - 33.45	9.87	<u>8.71</u>	6.48 - 10.72
Net Operating Profit (before Income Taxes)	<u>1.29</u>	(5.43)- 7.68	1.19	<u>1.11</u>	(1.28)- 2.03

[fol. 288]

Operating Expense Comparisons

	1961			1962		
	<u>All Firms</u>	<u>Comp.</u>	<u>Ill. (Chi.)</u>	<u>All Firms</u>	<u>Comp.</u>	<u>Ill. (Chi.)</u>
Total Expenses	9.910	9.883	8.840	9.808	9.777	8.729
Administrative	2.937	2.842	2.284	2.800	2.632	2.069
Selling	4.000	4.166	4.060	4.011	4.314	4.095
Shipping	1.287	1.266	.996	1.359	1.232	1.011
Warehouse	.651	.643	.777	.639	.622	.692
Occupancy	.461	.422	.387	.481	.447	.497
Other	.574	.544	.336	.518	.530	.345

	1963			
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp</u>	<u>Ill. (Chi.)</u>
Total Operating Expenses	9.942	1.767 - 33.454	9.869	8.713
Administrative	2.869	1.212 - 13.148	2.773	2.079
Selling	3.914	.109 - 14.642	4.025	4.024
Shipping	1.374	.000 - 5.690	1.326	1.029
Occupancy	.521	.033 - 2.787	.491	.515
Warehouse	.699	.000 - 2.356	.687	.692
Other	.565	(.438)- 2.232	.567	.374

[fol. 289]

Operating Expenses (Detailed)

	1961		1962		1963	
	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)
<u>Administrative Expenses</u>	<u>2.937</u>	<u>2.284</u>	<u>2.800</u>	<u>2.069</u>	<u>2.869</u>	<u>2.079</u>
Executive Salaries	.713	.333	.603	.373	.662	.292
Executive Travel	.081	.029	.084	.024	.082	.038
Office Salaries	.862	.765	.805	.632	.867	.661
Office Supplies	.113	.096	.110	.091	.111	.075
Office Equipment	.125	.162	.119	.189	.120	.187
Business Licenses	.062	.005	.064	.005	.063	.008
Postage	.027	.026	.027	.024	.028	.026
Telephone & Telgrph.	.120	.101	.121	.106	.122	.093
Assoc. Dues & Subscriptns.	.075	.029	.073	.026	.070	.028
Gen'l. Insurance, Bonding	.160	.144	.147	.115	.146	.121
Contributions	.044	.034	.043	.024	.040	.022
Legal and Auditing	.091	.106	.084	.103	.088	.110
Other	.464	.449	.440	.377	.470	.368
<u>Selling Expenses</u>	<u>4.000</u>	<u>4.060</u>	<u>4.011</u>	<u>4.095</u>	<u>3.914</u>	<u>4.024</u>
Managers & Supervisors	.586	.446	.579	.445	.547	.467
Salesmen's Salaries	2.638	2.979	2.634	2.957	2.602	2.871
Salesmen's Travel Exp.	.254	.004	.265	.032	.252	.039
Advertising & Promotion	.370	.509	.389	.461	.350	.426
Other	.152	.122	.144	.200	.163	.221
<u>Shipping Expenses</u>	<u>1.287</u>	<u>.996</u>	<u>1.359</u>	<u>1.011</u>	<u>1.374</u>	<u>1.029</u>
Salaries & Wages	.799	.708	.803	.743	.831	.728
Common & Contract Delivery	.128	.048	.135	.074	.166	.001
Rental of Equipment	.035	.125	.081	.091	.103	.155
Oper. & Maint. of Equipmt.	.164	.069	.175	.064	.161	.077
Depreciation of Equipment	.070	.018	.070	.010	.067	.019
Other	.041	.028	.045	.029	.046	.049

Operating Expenses (Detailed)

	1961		1962		1963	
	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)	All Firms	Ill. (Chi.)
<u>Occupancy Expenses</u>	<u>.461</u>	<u>.387</u>	<u>.481</u>	<u>.497</u>	<u>.521</u>	<u>.515</u>
Salaries & Wages	.021	.020	.016	.019	.018	.030
Real Estate Taxes	.040	.050	.035	.059	.043	.073
Depreciation on Bldgs.	.051	.063	.051	.075	.058	.066
Rent	.204	.123	.231	.167	.243	.164
Insurance on Buildings	.013	.001	.016	.017	.019	.017
Light, Heat & Power	.050	.057	.053	.067	.057	.066
Repairs & Maintenance	.041	.044	.038	.052	.041	.051
Outside Storage	.017	-	.022	.013	.017	.003
Other	.021	.029	.019	.028	.025	.045
<u>Warehouse Operation Expense</u>	<u>.651</u>	<u>.777</u>	<u>.639</u>	<u>.692</u>	<u>.699</u>	<u>.692</u>
Salaries & Wages	.562	.644	.549	.625	.595	.593
Supplies and Equipment	.035	.039	.046	.023	.043	.021
Other	.054	.094	.044	.033	.061	.078
<u>Other Expenses</u>	<u>.574</u>	<u>.336</u>	<u>.518</u>	<u>.345</u>	<u>.565</u>	<u>.374</u>
Interest Paid	.270	.183	.237	.184	.260	.167
Loss From Bad Debts	.107	.104	.107	.134	.126	.161
Personal Property Taxes	.096	.013	.082	.010	.083	.013
Other	.101	.031	.092	.017	.096	.033



[fol. 291]

Sales, Profits and Expenses Per Invoice(Based on returns from 8 firms in your State)

	<u>\$ Per Invoice</u>		
	<u>All Firms</u>	<u>Comp.</u>	<u>Ill. (Chi.)</u>
Net Sales . . . . .	116.27	131.29	126.15
Gross Profit . . . . .	13.16	14.39	12.31
Total Expenses . . . . .	11.64	12.93	10.80
Net Profit . . . . .	1.52	1.46	1.51
Selling Expenses . . . . .	4.57	5.35	4.93
Salesmen's Salaries. . . . .	3.06	3.64	3.57
Salesmen's Travel Expense. . . . .	.26	.21	.05
Shipping & Delivery Expense. . . . .	1.63	1.66	1.30
Occupancy Expense. . . . .	.63	.66	.66
Warehousing Expense. . . . .	1.83	.96	.88
Warehousing Salaries . . . . .	.69	.80	.74
Administrative Expense . . . . .	3.25	3.42	2.52
Office Salaries. . . . .	1.06	1.28	.85
Other Expenses . . . . .	.73	.88	.51

[fol. 292]

Employment Statistics

	<u>All Firms</u>	<u>Comp.</u>	<u>Ill. (Chi.)</u>
Total Employees	<u>50.3</u>	<u>148.6</u>	<u>144.9</u>
Sales Employees	19.8	58.9	61.3
Shipping & Delivery Employees	9.6	26.9	26.4
Warehouse & Occupancy Employees	7.2	21.3	25.4
General & Administrative Employees	13.7	41.5	31.8
Sales Per Employee (\$ 000)	134.7	139.5	139.5
Sales Per Sales Employee (\$ 000)	341.3	355.8	329.6
Sales Per Shipping and Delivery Employee (\$ 000)	708.7	764.4	764.5
Sales Per Warehouse and Occupancy Employee (\$ 000)	943.6	975.1	797.9
Sales Per General & Administrative Employee (\$ 000)	494.8	502.2	636.2

[fol. 293]

Annual Survey of Operations

1963

Missouri - p. 4

Prepared by

the

School of Commerce and Finance

Saint Louis University

for

Wine and Spirits Wholesalers of America, Inc.

[fol. 294]

This report is based on 16 questionnaires  
representing 18 establishments. The comparisons  
are based on all firms reporting in 1963 and on the average firms  
of the same sales volume classifications as those reporting from  
your state.

[fol. 295]

Selected Ratios

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>Mo.</u>	<u>Range of Experience</u>
Current Ratio	1.59	.67 - 110.48	1.95	1.59	1.05 - 9.37
Annual Rate of Stock Turnover	6.66	2.33 - 16.14	6.12	5.67	3.10 - 11.30
Closing Inv. as Per Cent of Beg. Inventory	100.52	45.03 - 343.00	99.50	105.59	64.64 - 157.80
Return on Net Worth	12.28	(2587.11)- 177.02	9.48	8.64	(1.20)- 28.66
Return on Total Assets	4.58	(16.32)- 54.14	4.27	3.42	(1.10)- 12.27

Income Statement Comparisons

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp.</u>	<u>Mo.</u>	<u>Range of Experience</u>
Net Sales	100.00		100.00	100.00	
Cost of Goods Sold	88.77	68.63 - 96.80	88.21	89.26	85.64 - 91.74
Gross Profit	11.23	3.20 - 31.37	11.79	10.74	8.26 - 14.36
Operating Exp.	<u>9.94</u>	1.77 - 33.45	10.54	<u>9.63</u>	6.91 - 13.61
Net Operating Profit	<u>1.29</u>	(5.43)- 7.68	1.25	<u>1.11</u>	(.55)- 4.18

Operating Expense Comparisons

	1963				
	<u>All Firms</u>	<u>Range of Experience</u>	<u>Comp</u>	<u>Mo.</u>	<u>Range of Experience</u>
Total Operating Expenses	9.942	1.767 - 33.454	10.454	9.625	6.910 - 13.613
Administrative	2.869	1.212 - 13.148	3.373	3.170	2.329 - 6.162
Selling	3.914	.109 - 14.642	3.773	3.453	2.133 - 4.349
Shipping	1.374	.000-- 5.690	1.571	1.232	.587 - 4.821
Occupancy	.521	.033 - 2.787	.586	.556	.239 - 1.533
Warehouse	.699	.000 - 2.356	.641	.630	.000 - 1.464
Other (including Bad Debts)	.565	(.438)- 2.232	.510	.584	.043 - 1.618

[fol. 297]

Operating Expenses (Detailed)

	1963			1963	
	All Firms	Mo.		All Firms	Mo.
<u>Administrative Expenses</u>	<u>2.869</u>	<u>3.170</u>	<u>Occupancy Expenses</u>	<u>.521</u>	<u>.556</u>
Executive Salaries	.662	1.110	Salaries & Wages	.018	.020
Executive Travel	.082	.105	Real Estate Taxes	.043	.073
Office Salaries	.867	.837	Depreciation on Bldgs.	.058	.059
Office Supplies	.111	.034	Rent	.243	.283
Office Equipment	.120	.120	Insurance on Buildings	.019	.007
Business Licenses	.063	.083	Light, Heat & Power	.057	.064
Postage	.028	.024	Repairs & Maintenance	.041	.037
Telephone & Telegraph	.122	.100	Outside Storage	.017	.009
Assoc. Dues & Subscriptns.	.070	.083	Other	.025	.004
Gen'l. Insurance, Bonding	.146	.143			
Contributions	.040	.030	<u>Warehouse Operation</u>		
Legal and Auditing	.088	.101	<u>Expense</u>	<u>.699</u>	<u>.630</u>
Other	.470	.345	Salaries & Wages	.595	.561
			Supplies & Equipment	.043	.037
<u>Selling Expenses</u>	<u>3.914</u>	<u>3.453</u>	Other	.061	.032
Managers & Supervisors	.547	.324			
Salesmen's Salaries	2.602	2.213	<u>Other Expenses</u>	<u>.565</u>	<u>.584</u>
Salesmen's Travel Exp.	.252	.642	Interest Paid	.260	.133
Advertising & Promotion	.350	.186	Loss From Bad Debts	.126	.127
Other	.163	.088	Personal Propty. Taxes	.083	.045
			Other	.096	.279
<u>Shipping Expenses</u>	<u>1.374</u>	<u>1.232</u>			
Salaries & Wages	.831	.665			
Common & Contract Delvry	.166	.080			
Rental of Equipment	.103	.227			
Oper. & Maint. of Equipmt.	.161	.151			
Depreciation of Equipmt.	.067	.078			
Other	.046	.031			



Sales, Profits and Expenses Per Invoice(Based on returns from 12 firms in your State)

	\$ Per Invoice		
	<u>All</u> <u>Firms</u>	<u>Comp.</u>	<u>Mo.</u>
Net Sales	116.27	99.08	105.03
Gross Profit	13.16	11.47	11.13
Total Expenses	11.64	10.22	10.04
Net Profit	1.52	1.25	1.09
Selling Expenses	4.57	3.68	3.64
Salesmen's Salaries	3.06	2.25	2.28
Salesmen's Travel Expense	.26	.36	.70
Shipping & Delivery Expense	1.63	1.57	1.12
Occupancy Expense	.63	.59	.63
Warehousing Expense	.83	.63	.75
Warehousing Salaries	.69	.54	.66
Administrative Expense	3.25	3.21	3.16
Office Salaries	1.06	.93	.92
Other Expenses	.73	.54	.74

[fol. 299]

Employment Statistics

	<u>All Firms</u>	<u>Comp</u>	<u>Mo.</u>
Total Employees	<u>50.3</u>	<u>27.9</u>	<u>26.5</u>
Sales Employees	19.8	10.6	11.4
Shipping & Delivery Employees	9.6	5.3	3.3
Warehouse & Occupancy Employees	7.2	4.3	3.7
General & Administrative Employees	13.7	7.7	8.1
Sales Per Employee (\$ 000)	134.7	115.7	136.8
Sales Per Sales Employee (\$ 000)	341.3	308.0	319.0
Sales Per Shipping and Delivery Employee (\$ 000)	708.7	599.6	1097.8
Sales Per Warehouse and Occupancy Employee (\$ 000)	943.6	762.2	983.5
Sales Per General & Administrative Employee (\$ 000)	494.8	419.5	443.3

[fol. 300]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF JACK GOODMAN IN SUPPORT OF MOTION

State of New York,  
County of Albany,      ss.:

Jack Goodman, being duly sworn, deposes and says:

1. I am an attorney-at-law with offices at No. 100 State Street, Albany, New York.

2. I am, and have for the past nine years been, counsel to the New York State Wholesale Liquor Association, Inc. The New York State Wholesale Liquor Association, Inc., is a trade association, the members of which consist of most of the liquor and wine wholesalers doing business in the so-called "upstate" area of New York—to wit, the entire state excluding Metropolitan New York, Long Island, and Westchester County.

3. As counsel for the past nine years to this Association, I am acquainted with the operations of these member wholesale businesses.

4. These liquor and wine wholesale businesses are independent operations. The stock in these wholesaler corporations is not owned by any supplier or brand owner. Nor do suppliers or brand owners control these independent wholesalers by interlocking director or officer arrangements.

5. The average wholesaler handles the brands of approximately fifteen (15) brand owners.

6. The number of brands or labels owned by a brand owner will vary. Some brand owners have as few as three or four brands; some brand owners have as many as one hundred brands.

7. The amount of business which any wholesaler will do in the brands of any one brand owner will vary considerably. If the brands of a particular supplier or brand owner

constitute the major line in the wholesaler's operation, the business done in the brands of such supplier or brand owner may constitute as much as 50% of the total business done [fol. 301] by such wholesaler. On the other hand, if the brands of a particular supplier do not constitute the major line in the wholesaler's operation, the business done in the brands of such supplier or brand owner may constitute as little as 1% of the total business done by such wholesaler.

8. Likewise, with respect to a particular brand of a brand owner, the amount of business which any wholesaler will do in a single brand will vary considerably. The business done in one brand may range as high as 20% of the total business done by such wholesaler; on the other hand, the business done in one brand may amount to as little as a fraction of 1% of the total business done by such wholesaler.

9. In view of the above circumstances and conditions pertaining to the operations of the liquor and wine wholesalers in the upstate New York area, I as counsel to the above designated Association am unable to advise the members thereof whether and to what extent they are or may be "related persons" as defined in Section 101-b, subdivision 3, paragraph (f), of the Alcoholic Beverage Control Law. For example, I am unable to advise what is the meaning of the term "principal or substantial business," in said paragraph. I am unable to advise whether a wholesaler is a "related person" for all of his business, or for only that portion of the business he does in the brands of one brand owner, or for only that portion of the business he does in one brand of one brand owner. Likewise, I am unable to advise the members of my association as to the meaning of the clause in said paragraph—to wit, "who has an exclusive franchise or contract to sell such brand or brands." The State Liquor Authority has ruled that a wholesaler must sell to retailers in all parts of the State, unless the wholesaler specifically designates the retailers to which he will limit distribution.

(Sworn to by Jack Goodman, October 15, 1964.)

[fol. 302]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

## AFFIDAVIT OF JACK W. MARER IN SUPPORT OF MOTION

State of Nebraska,  
County of Douglas,        ss.:

Jack W. Marer, being first duly sworn, upon my oath, depose and say, that I am an Attorney at Law admitted to practice in all of the courts of the State of Nebraska, and in the United States District Court for Nebraska, and in the Eighth Circuit Court of Appeals since July 2, 1926, and that I have been actively so engaged ever since that date.

Since 1940 I have been General Counsel of the Nebraska Wholesale Liquor Distributors Association, an association composed of duly licensed wholesale distributors of alcoholic beverages in the State of Nebraska, and in such representation I have become familiar with the laws of the State of Nebraska regulating the manufacture, distribution and sale of alcoholic beverages and the general trade practice in the alcoholic beverage industry in the State of Nebraska.

Affiant further states there is no provision in the Nebraska Liquor Control Act or any rule or regulation of the Nebraska Liquor Control Commission now in effect which requires the filing or posting of prices or discounts from the manufacturer to the wholesaler, or from the wholesaler to the retailer, or from the retailer to the consuming public, and there is no official record or listing of any such prices.

Affiant further states that as a trade accommodation and on a strictly voluntary basis, the alcoholic liquor distributors who are members of this Association do publish their wholesale price list to retailers in a trade magazine known as the Nebraska Beverage Analyst, and that each of said distributors pays for its own individual listing, and

that such listed prices do not include so-called "deals" or quantity discounts, and that each distributor promulgates its own deals or quantity discounts, based upon its own [fol. 303] individual judgment and discretion, and that such special programs vary from time to time and remain in effect for both short and long periods of duration, with the result that the actual net price of any alcoholic beverage will vary from time to time, based upon the nature, type and character of the so-called "deal" or quantity discount and the duration of the program.

That such types of deals or quantity discounts are permitted under Federal law and that a copy of two (2) Revenue Rulings are attached hereto and made a part hereof by reference; that there is no statute or ruling or regulation under the Nebraska Liquor Control Act which in any manner prohibits these types of arrangements.

These so-called "deals" and quantity discounts are in some degree based upon competition and other conditions existing within the trade area of the State of Nebraska at the time.

That the only manner known to this Affiant by which anyone could ascertain the current prevailing list price of any alcoholic beverage sold by any alcoholic liquor distributor to retailers in any particular month would be to physically examine the records of every wholesale liquor dealer, of which there are eight (8) in the City of Omaha, Nebraska, covering their sales to retail liquor dealers throughout the State of Nebraska, of which there are 1768, and that in the opinion of this Affiant it would take two persons approximately one month to make such physical examination of all of such invoices working under normal conditions.

Affiant further states that the books and records of alcoholic liquor distributors are not open to inspection by the general public but are only open to inspection by the Internal Revenue Service and the Nebraska Liquor Control Commission and that in the opinion of this Affiant such wholesale liquor dealers would not permit the inspection

[fol. 304] of their records by any persons for any purpose except by the persons duly authorized by law so to do.

Affiant further states that there does not presently exist any sub-jobbing in this state by duly licensed alcoholic liquor distributors.

Further Affiant sayeth not.

(Sworn to by Jack W. Marer, August 21, 1964.)

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RULES, ATTACHED TO FOREGOING AFFIDAVIT

Rev. Rul. 54-161, C. B. 1954-1, 338.

Price reductions, rebates, refunds, and discounts given by a wholesale liquor dealer pursuant to an agreement made at the time of the sale of the merchandise involved are considered a part of the sales transaction, constituting reductions in price pursuant to the terms of the sale. Such transactions do not fall within the purview of Section 5(b) of The Federal Alcohol Administration Act, provided they do not involve the imposition of any requirement upon the retailer to take and dispose of a certain quota of the wholesale dealer's products, or do not involve any of the other practices set forth in section 5(a) to 5(d), inclusive, of the Act. This view would hold irrespective of whether the quantity discount was *prorated* and allowed on each delivery, given in a lump sum after the entire quantity of merchandise purchased had been delivered, or based on dollar volume or on the quantity of merchandise purchased.

Ordinarily "free" goods are nothing more than price reductions in the same status as discounts and, similarly, are not within the purview of Section 5(b) of The Federal Alcohol Administration Act. For example, if a wholesale liquor dealer agreed to "give" a retail liquor dealer a "free" [fol. 305] case for each ten purchased, such transaction is essentially a reduction in the usual price. However, if the amount of the product given free with the order is such that the pricing aspect is merely a *subterfuge*, the trans-

action would constitute a "gift" within the meaning of this section of The Federal Alcohol Administration Act.

Rev. Rul. 58-121, C. B. 1958-1, 609.

A wholesale liquor dealer may, without violation of section 5 of The Federal Alcohol Administration Act, offer to retail dealers combination "deals" composed of two or more kinds or brands of distilled spirits and/or wines at a special price at less than the combined list price of such items if sold separately, provided the retailer is given the option of purchasing the brands or kinds separately at the regular list price thereof and is without compulsion to purchase merchandise which he does not want. Such a transaction is held to be merely a quotation of price which is not within the purview of the trade practice provisions of the Act. For an example of the types of sales which constituted a violation, see, *Joseph F. Black v. Magnolia Liquor Company, Inc.*, 355 U. S. 24.

[fol. 306]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF CHESTER F. McNAMARA IN SUPPORT OF MOTION  
State of Illinois,  
County of Cook, ss.:

Chester F. McNamara, being first duly sworn on oath, deposes and says:

1. That he is an Attorney at Law, with offices at 188 W. Randolph Street, Chicago, Illinois; that he is the Executive Secretary and Counsel of the Illinois Wholesale Liquor Dealers Association, a trade association of wholesalers of alcoholic beverages in the State of Illinois, and has held this position since 1953; that he is thoroughly familiar with the laws of Illinois pertaining to this industry and also familiar with the trade practices of the industry.



2. That there is no law, rule or regulation in the State of Illinois which requires that prices of alcoholic beverages from supplier to wholesaler or from wholesaler to retailer be filed or posted.

3. That as a matter of trade accommodation, wholesalers list for the information of retailers in the Illinois Beverage Journal, a trade publication, prices representing suppliers' recommended suggested selling prices. There is no State law or agency rule or regulation requiring prices to be uniform to a class of purchasers. Discounts also vary, and there is no limitation on such discounts.

4. That there is some sub-jobbing of supplier's brands, sometimes to related firms.

5. That there is no statutory requirement in respect to the listing of prices from suppliers to wholesalers or any requirement that they be uniform or non-discriminatory.

6. That the only way to ascertain the lowest price and greatest discount or allowance on any brand sold by wholesaler[s] to retailers in this State in any given month is by the physical inspection of all the invoices of all the wholesalers in this State who sell such brand. Based on your Affiant's experience in the trade, no wholesaler would permit such inspection, unless it is required by Illinois Law, and then only would it be available to State officials. Even if allowed, due to the very large number of invoices involved, it would take considerable time, probably fifteen (15) days or more to so ascertain such lowest price or discount on any item.

(Sworn to by Chester F. McNamara, August 21, 1964.)

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF CHARLES W. SAND IN SUPPORT OF MOTION

State of Wisconsin  
County of Milwaukee

Charles W. Sand, being duly sworn, deposes and says:

I am an Attorney at Law with offices at 110 East Wisconsin Avenue, Milwaukee, Wisconsin. I am and for the past ten years have been the Executive Vice President and Counsel of the Wisconsin Wine and Spirits Institute, a trade association of wholesalers in this state. I am thoroughly familiar with the laws, rules, regulations, and trade practices affecting the industry in this state.

In the state of Wisconsin we have no requirements for price filing and no requirement for a mandatory minimum markup. Prices from wholesaler to retailer may change from day to day and from customer to customer; they also differ with respect to the trading area of the retailer.

[fol. 308] A small minority of wholesalers, on a voluntary basis, advertise their prices in the Wisconsin Beverage Journal, a trade publication. Such advertising or listed prices are the "suggested" prices to retailers but not necessarily the prices at which sales are made nor do they reflect any deals or discounts.

The actual prices from wholesaler to retailer differ to meet competition or other trade conditions.

Other than a few brands, most items are handled by two or more wholesalers so that there is competition on the same item or brand.

There are some 90 odd wholesalers in the state and over 14,000 retailers.

In order to ascertain the lowest price in any given month for any given item covering sales from wholesalers to retailers, it would be necessary to check the books and invoices of the wholesalers handling that item. Based upon my experience, wholesalers would not permit

such inspection unless mandatorily required by state or Federal law. Even if so permitted, such inspection would take a considerable length of time by virtue of the large number of wholesalers and retailers and the large numbers of transactions in any given month.

(Sworn to by Charles W. Sand, August 25, 1964.)

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[fol. 309]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF WILLIAM STEINBERG IN SUPPORT OF MOTION  
State of Florida,  
County of Hillsboro,

William Steinberg, being duly sworn, deposes and says:

I am the Executive Director of the Wholesale Liquor Dealers of Tampa, a trade association of wholesalers of alcoholic beverages, with offices at 5102 Longfellow Avenue, Tampa, Florida, and have occupied this position for the past nine years. Prior to that and for five years, I owned a company wholesaling and rectifying alcoholic beverages in the State of Florida. I am thoroughly familiar with the laws and trade practices affecting the industry in this State.

There is no state law or agency rule or regulation requiring the filing or posting of prices or discounts from supplier to wholesaler or from wholesaler to retailer, and no official record of such prices.

As a trade accommodation, most wholesalers publish their prices in trade journals such as the Southern Beverage Journal and the Florida Beverage Journal. Discounts are not published. Although prices to retailers are generally uniform, discounts are not, and vary from day to day, from retailer to retailer, depending on quantity (which also may not be uniform), on competition, on the importance of the retailer involved, etc. There is no state law or agency rule or regulation affecting discounts.

The only way to ascertain the lowest price or greatest discount on any brand sold by wholesalers to retailers in any month is to physically examine every invoice of every wholesaler selling such brand. From my experience, I know that wholesalers will not permit such examination of their records, unless by State officials pursuant to law or regulation.

(Sworn to by William Steinberg, May 25, 1964.)

[fol. 310]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

ANSWER

Defendants, by Louis J. Lefkowitz, Attorney General of the State of New York, answering the complaint herein:

I. Deny each and every allegation of paragraphs of the complaint numbered 53, 54, 56, 57, 58, 59, 60, 61, 63, 91, 94, 95, 96, 98, 107, 111, 113 and 114.

II. Admit the allegations contained in the paragraph of the complaint numbered 42, except deny the allegation that paragraph (f) of Section 9 of the new Act does not specify who is to file the affirmation; and for provisions of said paragraph (f) of Section 9 refer to the contents thereof.

III. Deny each and every allegation contained in the paragraph of the complaint numbered 52 and allege that prohibition of sales in New York for any brand of liquor for which an affirmation has not been filed is by provision of said paragraph effective during the period "covered by any such schedule" for which affirmation is required and has not been filed; and for the provisions of said paragraph (h) reference is made to the contents thereof.

IV. Admit the allegations contained in the paragraph of the complaint numbered 55 which describe the provi-

sions of §§2 and 101 (b-1) of the Alcoholic Beverage Control Law and Section 7 of Chapter 531 of the Laws of 1964, and deny each and every other allegation of said paragraph 55.

V. Deny each and every allegation contained in the paragraph of the complaint numbered 112 and allege that Rule 16, §65.69 of the Rules of the State Liquor Authority, [fol. 311] adopted pursuant to Section 101 (b) of the Alcoholic Beverage Control Law which became effective October 31, 1964, provides that "net bottle and case price paid by the seller" shall not apply "to any item where the manufacturer is the seller".

Wherefore, defendants demand judgment that the complaint herein be dismissed, together with the costs and disbursements of this action.

Louis J. Lefkowitz, Attorney General of the State  
of New York, Attorney for Defendants.

(Verified by Donald S. Hostetter, December 21, 1964.)

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[fol. 312]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 6127—64.

DEFENDANTS' NOTICE OF MOTION TO DISMISS MOTION FOR TEMPORARY INJUNCTION AND FOR A TEMPORARY RESTRAINING ORDER PENDING THE HEARING AND DETERMINATION OF THE MOTION FOR A TEMPORARY INJUNCTION—December 22, 1964

Please Take Notice that on the complaint and answer herein, and the affidavits of William E. Phillips and Ruth Kessler Toch, defendants will move this Court at a Special Term, Part I hereof, to be held in and for the County of Albany on December 28, 1964, at 10 A. M. on that day, or as soon thereafter as counsel can be heard, which is the

return date and place of the motion heretofore made herein by plaintiffs for an order restraining defendants from enforcing the provisions of §9 and of §7, subdivision 3(a) of Chapter 531 of the Laws of 1964, pending the determination of the issues in the action, for an order dismissing the complaint herein, or in the alternative, for judgment declaring §9 of Chapter 531 of New York Laws of 1964 and §7, subdivision 3 (2) of Chapter 531 of New York Laws of 1964 to be in all respects constitutional and valid, and for such other and further relief as to this Court shall seem just and proper, together with the costs of this action.

Dated: Albany, N. Y., December 22, 1964

Yours, etc.

Louis J. Lefkowitz, Attorney General of the State of New York, Attorney for Defendants, Office and Post Office Address, The Capitol, Albany, N. Y. 12224.

[fol. 313]

To:

Lord, Day & Lord, Esqs., Attorneys for Plaintiffs, 25 Broadway, New York, New York.

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IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 6127—64.

AFFIDAVIT OF RUTH KESSLER TOCH IN SUPPORT OF MOTION

State of New York,

County of Albany, ss.:

Ruth Kessler Toch, being duly sworn, deposes and says:

I am Assistant Solicitor General in the office of Attorney General Louis J. Lefkowitz, attorney for the defendants in the above action, have had charge of this action since its inception and am familiar therewith.

This affidavit is made in support of defendants' motion to dismiss the complaint herein, or in the alternative, for judgment declaring §9 of Chapter 531 of New York Laws of 1964 and §7, subdivision 3 (a) of said Chapter to be in all respects constitutional and valid; and in opposition to plaintiffs' application for a preliminary injunction restraining defendants from enforcing said statutory provisions pending the determination of the issues in this action. [fol. 314] For plaintiffs to sustain their right to the extreme, relief of staying the enforcement of the statutory provisions, their ultimate victory in the action must not be in doubt. This plaintiffs do not show.

As appears from the accompanying affidavit of William E. Phillips, Chief Executive Officer of the State Liquor Authority, the assertions of impossibility of performance in the complaint and in sundry affidavits submitted by plaintiffs are without substance, are conjectures, and do not constitute problems which are beyond being administratively resolved.

They do not in any case support the constitutional challenge which plaintiffs make to the statutory provisions they attack, as will more fully be set forth in memoranda of law which will be submitted to the Court by defendants.

Plaintiffs not having sustained their burden of showing a clear right to the drastic relief of preliminary injunction, it should be denied and the stay which was granted in the order to show cause should be vacated.

Plaintiffs not having stated facts sufficient to constitute a cause of action, the complaint should be dismissed, or in the alternative, judgment be granted defendants declaring §9 and §7, subdivision 3 (a) of Chapter 531 of New York Laws of 1964 to be in all respects constitutional and valid.

(Sworn to by Ruth Kessler Toch, December 22, 1964.)



[fol. 315]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF WILLIAM E. PHILLIPS IN SUPPORT OF MOTION  
State of New York,  
County of Albany, ss.:

William E. Phillips, being duly sworn, deposes and says:

This affidavit is made in support of a motion to dismiss the complaint herein and in opposition to plaintiffs' application for a preliminary injunction restraining defendants from enforcing said statutory provisions pending the determination of the issues in this action.

I am Chief Executive Officer and Deputy Commissioner of the State Liquor Authority. I have been employed by the Authority more than 29 years. For approximately the past 10 years I have been Deputy Commissioner and adviser to the members of the Authority in respect to industry and community relations. In such capacity, as occasion arises, I confer with manufacturers and wholesalers in connection with their problems and conduct studies in order to assist in resolving such problems in a manner consistent with the intent of the Alcoholic Beverage Control Law and that will be equitable to the industry as a whole.

The instant amendment to the Alcoholic Beverage Control Law complained of in this action presents difficulties not too much different from those encountered in connection with prior amendments to such law which I have implemented and effectuated by drafting rules and procedures for adoption by the Authority. Most amendments to the Alcoholic Beverage Control Law have afforded to the Authority discretion in implementation consistent with [fol. 316] the purposes of the statute. And the instant amendment is no exception. Subdivision 4 of §101-b provides:

"The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section."



The Authority fully intends to administer the law within the scope of its discretion in such a manner as will be viable and practicable.

The difficulties complained of by the plaintiffs are largely conjectural and without basis in fact. It is not the intent of the law or the Authority to unduly burden or inhibit plaintiffs in their business or to subject them to prosecution unless the affirmations were to be recklessly false and submitted in bad faith. In any case of hardship occasioned by extraordinary circumstances, the Authority will in its discretion and upon application, as it has in the past and as plaintiffs are full well aware, for good cause shown and for reasons not inconsistent with the purpose of the statute, grant dispensation necessary to avoid undue and uncalled for hardship.

I direct my comments to allegations in the complaint and statements in affidavits which contend that compliance with the statute is impossible; that the language thereof is vague and indefinite to an extent which obviates the possibility of accuracy in affirmations called for, and that certain of their marketing practices militate against any precise determination as to actual prices.

I comment on these apart from whether there is legal substance to such contentions, which will be dealt with elsewhere.

In one of the affidavits submitted, it is conceded that sales in so-called control or monopoly States are 25¢ to \$1 less than in other States. The inescapable assumption must therefore be that the price in other States is not only possible to ascertain, but is actually known to plaintiffs.

[fol. 317] Affidavits submitted by the plaintiffs would make it appear that conformance with those parts of the statute requiring affirmations is impossible of compliance. They ignore the fact that in a number of other States, e. g., in the State of Pennsylvania, some of these same plaintiffs have been warranting for some time past that the price quoted to the Pennsylvania Liquor Control Board is "the lowest current price quoted to any other customer",

or "to any purchaser, dealer, agent or agency of any nature or kind anywhere in the United States of America". Certainly, what can be done in one jurisdiction should not be impossible in another or in New York.

Some of these affidavits also dwell at some length on the vagueness of the language of the statute. They protest unawareness of the meaning of the terms "allowances and inducements", notwithstanding the fact that these terms were incorporated in the Alcoholic Beverage Control Law of this State more than 20 years ago; that they have been doing business in this State throughout this period and that a number of administrative rulings and determinations have been made thereon by the Authority during this period, in some of which some of these plaintiffs were involved.

In the same vein they allege that because of discounts and allowances permitted in other States, it is impossible to arrive at a price at any given time. Again they reject their own experience. They ignore that as part and parcel of the offerings of their products in, for example, the State of Pennsylvania, they warrant that "if and when special cash or commodity, allowances, post-offs or discounts are offered to purchasers in any other State or the District of Columbia, the same" shall also be offered the Pennsylvania Liquor Control Board.

Similarly some of the plaintiffs express alleged confusion as to the term "related person". The statute provides a definition of the same. The long term practices of the Authority provide assurance that where uncertainty [fol. 318] arises in connection with a particular state of facts, the plaintiffs have access to the Authority for a ruling thereon, such as has been made repeatedly in the past in other matters.

It is my experience that the relationship of distillers and other brand owners with other concerns which handle their brand products is such as to leave little doubt, with rare exceptions, as to whether such concerns fit the definition of "related persons". In connection with those ex-

ceptions, the Authority stands ready to assist them in resolving the same.

From my knowledge of the liquor control statutes of other States and my dealings with other State administrators, I am aware that in addition to the warranties imposed by the so-called control or monopoly States which have already been touched upon, a number of other States have price posting requirements or mandatory mark-up provisions incorporated in their Alcoholic Beverage Control Law which make the pricing structure in those States a matter of prime concern to distillers and other brand owners.

It follows therefore that distillers are aware of the prices for the most part for which their brands are sold by themselves, their subsidiaries, and other related persons. In advance posting of prices, as some of the plaintiffs are required to do in many of the States of the United States, they necessarily act on knowledge of their prices generally, and in the instance of sales to the control or monopoly States on current lowest prices.

With respect to the plaintiffs' contention that subdivision 3 (a) of the statute would operate to preclude sales in other States, Rule 16(65.1) of the Authority confines the application of this subdivision to purchasers for resale in this State and further provides that a brand owner may actually purchase and receive liquor in this State even though an appropriate price schedule is not in effect, provided such brand owner does not offer for sale or sell [fol. 319] such brand for resale in this State unless and until an appropriate schedule of prices is in effect. Moreover, with respect to purchases by wholesalers where sale or delivery is outside the State, it should be noted that §3, subdivision 35 of the Alcoholic Beverage Control Law defines wholesaler as "any person who sells at wholesale any beverage for the sale of which a license is required under the provisions of this chapter." This has historically been construed as applicable only to a person licensed as a

wholesaler under the Alcoholic Beverage Control Law of this State.

(Sworn to by William E. Phillips, December 22, 1964.)

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IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

AFFIDAVIT OF JOHN F. O'CONNELL IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT

State of New York,  
County of New York, ss.:

John F. O'Connell, being duly sworn, deposes and says:

1. This affidavit is made in opposition to the motion to dismiss the complaint herein and in opposition to the defendants' request for judgment declaring Section 9 of Chapter 531 of the New York Laws, 1964 and Section 7, subdivision 3(a)-(b) of said Chapter to be in all respects constitutional and valid.

[fol. 320] 2. I am an attorney at law, duly admitted to practice in the Commonwealth of Massachusetts. I am President of National Association of Alcoholic Beverage Importers, Inc. I have held this post since June 15, 1964. Prior to my present position I was Chairman of the State Liquor Authority from 1943 to 1955. In such capacity I acquired a thorough knowledge of the rules and regulations and the policy of the Authority regarding enforcement of the Alcoholic Beverage Control Law. I have read and am familiar with the terms of Sections 7 and 9 of Chapter 531, Laws of 1964.

3. In an affidavit dated December 22, 1964 submitted in support of defendants' motion to dismiss the complaint herein, Mr. William E. Phillips, Deputy Commissioner of the State Liquor Authority, states that the deficiencies in Sections 7 and 9 of Chapter 531, which are set forth in the

complaint, can be remedied by rules to be adopted by the Authority. Aside from ignoring the well-known rule of law that unconstitutional laws cannot be remedied by administrative interpretation, this statement by Mr. Phillips also overlooks the fact that one reason for the 1964 amendments to the Alcoholic Beverage Control Law was, in the words of Governor Rockefeller, to remedy

“The system which has developed under the law during the past thirty years [which] has necessitated individual and subjective judgments—in too many cases arbitrary, discriminatory and capricious—thus opening the door to repeated instances of corruption and loss of public confidence.”

4. Mr. Phillips' affidavit further states that brand owners will be able to determine the lowest price at which they sell elsewhere in the nation because they are currently complying with contracts entered into with the Alcoholic Beverage Control Commissions of the various “control” states, [fol. 321] whereby brand owners agree to charge the individual State Control Authority a price no higher than the lowest charged elsewhere in the country.

5. My experience in the industry leads me to the conclusion that, notwithstanding these contracts with the control states, brand owners (and, necessarily, any wholesaler designated as an agent of a brand owner) will not be able to comply with the price affirmation provisions of Section 9 of Chapter 531, Laws of 1964. These contracts with the “control” states are voluntary in nature, whereas Chapter 531 is mandatory. If a brand owner should breach one of these contracts, he is faced only with a demand for compensation by the relevant State Authority. However, if one is charged with making an affirmation pursuant to Section 9 of Chapter 531 and does so erroneously, he is faced with up to six months in jail and loss of his New York license.

6. Further, while it is true that contracts such as those in force in Pennsylvania require a brand owner to reflect

in his Pennsylvania price "special cash or commodity allowances, post-off or discounts", Section 9 of Chapter 531 requires a new determination of the elements of a brand owner's price, for it speaks in terms of "rebates, free goods, *allowances and other inducements of any kind whatsoever offered or given*" to any purchaser elsewhere in the country. (Italics added.) It can be seen that the procedures used to comply with the "control" state contracts will not necessarily be of assistance in meeting the requirements of the new Act.

7. Finally, it should be noted that these contracts with the "control" states only apply to the price at which the brand owner-signer sells to his customers elsewhere in the United States and does not force him to attest to the prices charged by anyone else. By contrast, Section 9 of Chapter [fol. 322] 531, in addition to requiring a brand owner to affirm, at the risk of criminal penalty, that his price to wholesalers and retailers in New York is as low as his price elsewhere in the country, further requires him to affirm that the prices of independent wholesalers who sell to New York retailers and who are statutorily deemed to be "related" to the brand owner are no higher than the lowest price at which wholesalers who are "related" to the brand owner sell to retailers elsewhere in the country.

8. In making "discounts \* \* \* rebates, free goods allowances and other inducements of any kind whatsoever offered or given" to any purchaser elsewhere in the country an element of New York price of a particular item of liquor, Section 9 of Chapter 531 imposes statutory standards too vague to be obeyed. Mr. Phillips' affidavit states that these standards have been part of the Alcoholic Beverage Control Law of New York for more than twenty years and that a number of administrative rulings and determinations have been made by the Authority defining these terms for members of the industry.

9. To the best of my knowledge and belief, no such definitions have been promulgated, and it is also my belief that,

along with myself, others in the industry will not be able to determine with certainty how these terms are to be defined.

10. Mr. Phillips also expresses a belief in his affidavit that there will be little doubt among brand owners as to who comes within the definition of a "related" person.

11. In my opinion, based upon my experience and knowledge of the industry, there will indeed be no consensus among those in the industry as to who is a "related" person. No law in any other state has imposed a similar requirement upon the industry, and there is thus no precedent to assist the industry in meeting this statutory standard.

12. In his affidavit, Mr. Phillips affirms that the State Liquor Authority, by formulating regulations, stands ready to assist members of the industry in determining who is a "related" person. Yet Amended Rule 16 of the Authority, promulgated before the effective date of Section 9 of Chapter 531, makes no effort to define "related" person, even though, on information and belief, several industry representatives made a specific request that the Authority attempt to define the term in Amended Rule 16.

13. Mr. Phillips asserts that Section 7 of Chapter 531 does not require brand owners to file a schedule of prices charged wholesalers in states other than New York, because the term "wholesaler", as defined in Section 3 of the Alcoholic Beverage Control Law, includes "any person who sells at wholesale any beverage \* \* \* [for] which a license is required \* \* \* ." It is apparently Mr. Phillips' position that the phrase "irrespective of place of sale or delivery" added to Section 101-b-3(a) of the Alcoholic Beverage Control Law by Section 7 of Chapter 531 does not broaden the category of sales to wholesalers which must be the subject of price filing schedules.

14. It is clear under the interpretation of the prior law that a brand owner must file his price to a wholesaler selling



in New York even though the actual sale may have occurred at the brand owner's distillery outside of New York. Thus, in the view of Mr. Phillips, the amendments of Chapter 531 are superfluous.

15. However, if the new requirement of filing schedules of prices charged wholesalers "irrespective of place of sale [fol. 324] or delivery" is viewed with knowledge of the legislative background of Sections 7 and 9 of Chapter 531, the legislative intent to require the filing of prices charged wholesalers doing business solely in other states becomes clear.

16. Senator Zaretzki, an advocate of the no higher than the lowest price sections of Chapter 531, submitted an earlier bill embodying the basic provisions of what is now Section 9 of Chapter 531, in which brand owners were required to maintain a list of prices charged wholesalers in states other than New York. The purpose was evidently to provide a convenient way to ascertain if the price charged New York wholesalers was actually no higher than the lowest charged wholesalers elsewhere.

17. The new provision embodied in Section 7 of Chapter 531 requiring brand owners to file a schedule of prices to wholesalers "irrespective of place of sale or delivery" would seem to serve the same purpose as Senator Zaretzki's earlier bill. This conclusion is reinforced when one considers the alternative suggested by Mr. Phillips which would render the new language superfluous.

(Sworn to by John F. O'Connell, December 26, 1964.)



[fol. 325]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY  
Index No. 6127-64.

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Plaintiffs,  
*against*

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM  
H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE,  
constituting the State Liquor Authority, and LOUIS J.  
LEFKOWITZ, Attorney General of the State of New York,  
Defendants.

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Supreme Court, Albany County Special Term, December  
28, 1964

Calendar #10-241

Appearances:

Lord, Day & Lord, Esqs., Attorneys for Plaintiffs, 25  
Broadway, New York 4, New York.

Louis J. Lefkowitz, Attorney General, Attorney for De-  
fendants, The Capitol, Albany, New York 12224.

OPINION—April 19, 1965

Staley, Jr., J.:

This is a motion for an order restraining the defendants  
pending the determination of the issues in this action from:

1. Requiring plaintiffs to comply in any manner with  
any part of section 9, ch. 531 of the Laws of 1964.

[fol. 326] 2. Requiring those plaintiffs who sell their  
brands of liquor to wholesalers located in other states as  
well as to wholesalers in the State of New York to file a

schedule of prices at which such liquor is sold to wholesalers in states other than New York "irrespective of the place of sale or delivery" as required by section 7, ch. 531 of the Laws of 1964.

3. Requiring plaintiffs to include in their schedule of prices filed pursuant to section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by seller" as required by section 7, ch. 531 of the Law of 1964.

A cross-motion is made by the defendants for an order dismissing the complaint herein or, in the alternative, for judgment declaring section 9 of ch. 531 of the Laws of 1964 and section 7, subdv. 3 (a) of ch. 531 of the Laws of 1964 to be in all respects constitutional and valid. Section 7 and section 9, as herein referred to, in each instance shall mean section 7 and section 9 of ch. 531 of the Laws of 1964.

Section 9 added new paragraphs (d), (e), (f), (g), (h), (i), (j) and (k) to subdv. 3 of section 101-b of the Alcoholic Beverage Control Law. Section 7 enacted certain amendments to subdvs. 2, 3 and 4 of section 101-b and added new subdv. 6 to said section.

The provisions of section 7 require monthly schedules of brand owners', distillers' or manufacturers' bottle and case prices and discounts to wholesalers, as well as the net bottle and case price paid by the seller and of wholesalers' prices and discounts to retailers. The sale of liquor or wine to or by a wholesaler or retailer is prohibited unless the required schedules are filed and, in the case of a wholesaler, such prohibition applies irrespective of the place of sale or delivery. Schedules are not required to be filed for an item under a brand owned exclusively [fol. 327] by one retailer and sold at retail within the state exclusively by such retailer.

Discrimination in price or discounts and the granting of discounts other than as provided in the section is declared to be unlawful. Penalties are also provided for making any sale or purchase in violation of the provisions of the section or for making a false statement in any schedule

or for failing or refusing to comply with the provisions of the section.

In essence section 9 requires that, in addition to the schedules required by section 7, there must be filed an affirmation by the brand owner, or by the wholesaler designated as agent for the purpose of filing the schedule if the owner of the brand is not licensed by the liquor authority that the bottle and case price of liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item was sold by such brand owner or such wholesaler or any related person to any wholesaler anywhere in any other state of the United States or in the District of Columbia or to any state which owns and operates retail liquor stores in the month immediately preceding the month in which the schedule is filed. A similar affirmation is required concerning sale to retailers. In the event an affirmation is not filed with respect to an item of liquor the schedule for which the affirmation is required is deemed invalid and such item may not be sold to or purchased by a wholesaler during the period covered by the schedule. Provision is made for determining the lowest price for which any item was sold elsewhere and the making of a false statement in an affirmation is declared to be a misdemeanor.

The intent of the Legislature in making these amendments is set forth in section 8 which provides as follows:

"In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven

of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination."

The first two causes of action of the complaint seek a declaratory judgment determining (1) that section 9 is unconstitutional and void in that it deprives the plaintiffs named in the first cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's police power; is inconsistent with the declared policy of the Alcoholic Beverage Control Law as expressed in sections 2 and 101-b(1) of that law; it will not serve to cure the possibility of monopolistic and anti-competitive practices; it contravenes the terms and policy of the Sherman Act, 15 U. S. C. sections 1-7; it is in direct conflict with the Robinson-Patman Act, 15 U. S. C. sections 13(a), 13(b), and 21(a); it violates the Constitution of the United States by interfering with commerce among the states; it violates the Constitution of the State of New York and the Constitution of the United [fol. 329] States in that it is discriminatory; (2) that section 7, subdv. 3(a) is unconstitutional and void in that it violates the Constitution of the United States by interfering with commerce among the states and with foreign commerce and deprives the plaintiffs of property without due process of law; (3) that section 9(f) violates the Constitution of the State of New York and the Constitution of the United States in that it deprives the plaintiff named in the second cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's policy power; it is likely to cause

unwitting violations of the laws of New York and of other states and of the federal anti-trust laws; it is vague and indefinite.

The third and fourth causes of action of the complaint seek an injunction enjoining and restraining the defendants and their successors from imposing any sanctions or penalties for failure to submit the affirmations and verifications required by section 9 and for failure to file the prices and schedules required to be filed by section 7 on the ground that said sections are unconstitutional and void.

The cross-motion by the defendants for judgment declaring section 9 and section 7, subdv. 3(a) to be, in all respects, constitutional and valid is, in effect, a motion for summary judgment.

In weighing a challenge of unconstitutionality of a statute the Courts observe the legal principles; that a legislative enactment carries with it an exceedingly strong presumption of constitutionality; that every intendment is in favor of the statute's validity; that the heavy burden of demonstrating unconstitutionality beyond a reasonable doubt rests upon the one who attacks a statute as unconstitutional and that only as a last unavoidable result do Courts strike down a legislative enactment as unconstitutional. (*I.L.F.Y. Co. v. Temporary State Rent Comm.*, 10 [fol. 330] N. Y. 2d 263; *Wiggins v. Town of Somers*, 4 N. Y. 2d 215; *Lincoln Bldg. Assoc. v. Barr*, 1 N. Y. 2d 413; *New York State Thruway Authority v. Ashley Motor Court*, 12 A. D. 2d 223, affd. 10 N. Y. 2d 151; *Matter of Roosevelt Raceway, Inc. v. Monaghan*, 9 N. Y. 2d 293; *Matter of Ahern v. South Buffalo Ry. Co.*, 303 N. Y. 545, affd. 344 U. S. 367; *Martin v. State Liquor Authority*, 43 Misc. 2d 682, affd. 15 N. Y. 2d 707.)

The judgment of the Courts will not be substituted for that of the Legislature to determine whether the legislation will accomplish the desired end or can be effectively administered.

Courts no longer employ the due process clause of the Constitution to invalidate State Laws regulatory of business and industrial conditions merely because such laws are deemed unwise or improvident. (*Williamson v. Lee*

*Optical Co.*, 348 U. S. 483; *Gail Turner Nurses Agency, Inc. v. State of New York*, 17 Misc. 2d 273.)

Nor will the Court sit as a superlegislature to weigh the wisdom of each enactment brought before it, or decide whether policy which it expresses offends the welfare of a particular group. (*Day-Brite Light, Inc. v. Missouri*, 342 U. S. 421; *Gail Turner Agency v. State of New York*, *supra*.)

Nor are legislative enactments rendered invalid as a denial of due process or equal protection under the law because they impose financial hardship, result in reduced income or make it impossible for some to continue in a particular business. (*California Automobile Assn. v. Maloney*, 341 U. S. 105; *Breard v. Alexandria*, 341 U. S. 622; *Day-Brite Light, Inc. v. Missouri*, *supra*; *Gail Turner Agency v. State of New York*, *supra*.)

The Legislature is also presumed to have investigated the subject matter of the statute and found facts to support the legislation. (*Martin v. State Liquor Authority*, *supra*.) In this instance the Legislature, in addition, had [fol. 331] before it, when it enacted ch. 531 of the Laws of 1964, the Study Papers and Reports of the Moreland Commission. Being an enactment under the police power of the state, the strongest presumption of validity attaches to ch. 531 of the Laws of 1964 and the fact that it causes or might cause an economic hardship to those whom it affects is no argument against its constitutional validity, if it is an otherwise valid exercise of the state's police power. (*N. H. Lyons & Co., Inc. v. Corsi*, 3 N. Y. 2d 60.)

Plaintiffs' attack ch. 531 on the basis that it deprives them of liberty and property without due process of law in violation of the Constitutions of the State of New York and of the United States is contained in paragraphs 53, 90 and 91 of their complaint. In essence these paragraphs allege economic hardships, possible reduced profit margins, expenditures for new equipment, possible difficulty in increasing prices and difficulty in competing in other states. These allegations, even if proven, have no bear-

ing on the constitutionality of the statute. (*California Automobile Assn. v. Maloney, supra*; *Breard v. Alexandria, supra*; *Day-Brite Light, Inc. v. Missouri, supra*; *Gail Turner Agency v. State, supra*.)

Paragraphs 54, 90 and 94 of the plaintiffs' complaint allege that section 9 is an arbitrary, capricious and unreasonable exercise of the state's police power in that the term related person as defined in section 9 is vague; plaintiffs have no power to compel related persons to furnish them with information; price differentials are limited to state gallonage taxes or fees; it is impossible for plaintiffs to determine in any given month the prices at which brands sold by them in New York are sold to wholesalers and/or retailers throughout the United States and the District of Columbia; it is impossible for plaintiffs to determine what is meant by inducements of any kind whatsoever.

[fol. 332] The choice of measures is for the Legislature who are presumed to have investigated the subject and to have acted with reason not from caprice. "Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate." (*People v. Griswold*, 213 N. Y. 92.)

The provisions of ch. 531 requiring filing price schedules and affirmations is not, in of itself, either arbitrary or unreasonable. Such filings are certainly appropriate to the purpose intended of preventing consumers in New York State from being discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states. The fact that the plaintiffs might find it difficult to obtain the required information or are limited by the act in the price differen-



tials allowed, does not make the act arbitrary, capricious and unreasonable.

Plaintiffs' allegations concerning the vagueness of the terms "related person" and "inducements of any kind whatever" are equally without merit. Subdivision 4 of section 7 provides that "The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section." The section referred to is section 101-b of the Alcoholic Beverage Control Law.

The Legislature may and in many cases has enacted statutes in broad outline, leaving to administrative officials enforcing them the duty of arranging the details. (*Matter of National Surety Co.*, 239 App. Div. 490, *affd.* 264 N. Y. 473; *Matter of People [International Workers Order]*, 199 [fol. 333] Misc. 941, *affd.* 280 App. Div. 517, *affd.* 305 N. Y. 258; *Martin v. State Liquor Authority*, *supra.*) The Legislature often delegates to an executive officer the power to determine facts and conditions upon which the operation of a statute depends. This delegation of power relates to the execution of the law rather than to the making of the law. There is no valid objection to such a delegation of power. (*Tropp v. Knickerbocker Village, Inc.*, 205 Misc. 200, *affd.* 284 App. Div. 935; *Martin v. State Liquor Authority*, *supra.*)

Plaintiffs' contentions that section 9 is inconsistent with the declared policy of the Alcoholic Beverage Control Law to promote temperance and that section 9 will not serve to cure the possibility of monopolistic and anticompetitive practices at which it is directed are equally insufficient to prove invalidity of the statute.

Paragraphs 57, 58 and 59 of the plaintiffs' complaint consist of allegations that section 9 contravenes the terms and policy of the Sherman Act, 15 U. S. C. sections 1 through 7 and is in direct conflict with the Robinson-Patman Act, 15 U. S. C., sections 13(a), 13(b) and 21(a) and, therefore, must yield to the supremacy of such laws as required by Article VI of the Constitution of the United States.

Paragraph 60 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the United States by interfering with commerce among the states.

There is no doubt that under the twenty-first amendment of the Constitution of the United States that the State of New York may not only regulate, but may completely prohibit the importation of some or all intoxicants destined for use or consumption within its borders and may also restrict, prevent, regulate and control by taxation or otherwise, the distribution, use or consumption of intoxicants within the state. (*California v. Washington*, 358 U. S. 64; [fol. 334] *Department of Revenue v. James B. Beam Distilling Co.*, 377 U. S. 341; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324.)

The Alcoholic Beverage Control Law of the State of New York concerns itself solely with the regulation and control of the manufacture, sale and distribution within the State of New York of alcoholic beverages. (Alcoholic Beverage Control Law, section 2.) Any effect which it has on interstate commerce is entirely coincidental. The regulation and control of the sale and distribution of alcoholic beverages is a matter of local concern and the mere fact that such regulations have or may have some repercussions upon the activities of a business which operates nationwide does not invalidate the state action, particularly where the subject of the action is within the police power of the state. (*Osborn v. Ozlin*, 310 U. S. 53; *Southern Pacific Co. v. Arizona*, 325 U. S. 761; *Watson v. Employers Liability Corp.*, 348 U. S. 66.)

On the other hand the commerce clause of the United States Constitution, the Sherman Act and the Robinson-Patman Act are all concerned with interstate commerce as distinguished from intrastate commerce. Since the purpose of the Alcoholic Beverage Control Law is to regulate and control the intrastate sale and distribution of alcoholic beverages, it does not come within the realm of the

commerce clause of the United States Constitution nor of the Sherman Act or of the Robinson-Patman Act.

Paragraph 61 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the State of New York by discriminatingly imposing maximum price limitations upon sales made by persons dealing in liquor sold under "private labels" and sales made by vintners and wholesalers of wine.

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*Tigner v. Texas*, 310 U. S. 141.) [fol. 335] The fact that the Legislature omitted certain ones who might have been included in the statute, does not render it unconstitutional. (*New York Rapid Transit Corp. v. City of New York*, 275 N. Y. 258; *People v. Charles Schweinler Press*, 214 N. Y. 395; *National Psychological Assoc. v. University of State of New York*, 8 N. Y. 2d 197.)

"So long as there is some real difference in the situation, interests and capacity of different classes of citizens, this may be the basis of legislative classification which has a real and reasonable relationship to the difference which thus exists." (*People v. Klinck Packing Co.*, 214 N. Y. 121.)

The Legislature is also presumed to have investigated the subject matter of the legislation and based upon said investigation determined that a different classification should exist for brand owners, private brands and vintners.

Paragraph 63 of the plaintiffs' complaint consists of an allegation that paragraph 3(a) of section 7 violates the Constitution of the United States by requiring schedules for sales "irrespective of the place of sale or delivery" thereby interfering with commerce among the states and with foreign commerce and that the requirement of such schedules to contain the "net bottle and case price paid by the seller" deprives plaintiffs of property without due process of law and is an arbitrary, capricious and unreasonable exercise of the state's police power.

The fallacy of this allegation is in the fact that the plaintiffs fail to take into consideration the purpose of section 7 as is set forth in subdv. (1) thereof and also fail to take into consideration the saving clause or provision in subdv. 3(a).

Subdivision one provides: "It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages \* \* \*." This language sets forth words [fol. 336] of limitation and limits the applicability of the law to regulation and control within the state.

Subdivision 3(a) which contains the words "irrespective of the place of sale and delivery" also contains a savings clause which provides as follows: "Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter."

Thus a licensee may purchase liquor for reasons not inconsistent with the purpose of this chapter upon obtaining prior written permission of the authority. It goes without saying that a purchase or sale to a wholesaler for sale or distribution in interstate or foreign commerce would be a purpose not inconsistent with this chapter. The requirement that a licensee obtain prior permission to make such purchases or sales is not such a burden on interstate commerce as to render it invalid under the Commerce Clause of the United States Constitution, particularly when it is taken into consideration; that the term "wholesaler" means licensed wholesaler (section 3, subdv. 35 of the Alcoholic Beverage Control Law) that section 62 of said law permits a licensed wholesaler "to sell and deliver to persons outside the state pursuant to the laws of the place of sale and delivery; that the state has the power to require its licensees to make all reports which it deems necessary to be made by any licensee (section 17, subdv. 8 of the Alcoholic Beverage Control Law; amendment 21, United

States Constitution) and that the state and the Liquor Authority have the right and power to refuse to issue any license or permit provided for in the Alcoholic Beverage Control Law.

Plaintiffs' allegation in this paragraph of their complaint of a violation of due process stands in no better position than their similar allegations in paragraphs 54, 90 and 94 [fol. 337] of their complaint. The allegation that the requirement that "net bottle and case price paid by the seller" in no way serves to carry out the policy of the Alcoholic Beverage Control Law is a mere conclusion not supported by fact.

Further, the information would appear to have some value in determining whether the fundamental principles of price competition prevails in the industry and in determining whether unjustifiable prices are being charged to consumer in the state. Thus, this part of the legislation appears to be adapted to the end intended by section 8 of ch. 531. The Court must, therefore, give it effect. (*People v. Griswold, supra.*)

It, thus, clearly appears that the plaintiffs have failed to sustain the burden of demonstrating the unconstitutionality beyond a reasonable doubt. It is, therefore, the opinion of the Court that the sections in question are constitutional. There being no clear question of fact presented here, declaratory judgment may be appropriately directed. (*Martin v. State Liquor Authority, supra.*)

The motion to dismiss the complaint is denied and judgment is directed in favor of the defendant declaring section 9 and section 7, subdv. 3(a) of ch. 531 of the Laws of 1964 to be, in all respects, constitutional and valid.

Plaintiffs' application for a preliminary injunction is denied.

Attorney for defendants to submit order.

All papers to the attorney for defendants for filing upon entry of the order herein.

[fol. 338]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 6127-64

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Plaintiffs,  
against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM  
H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE,  
constituting the State Liquor Authority, and LOUIS J.  
LEFKOWITZ, Attorney General of the State of New York,  
Defendants.

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At a Special Term of the Supreme Court of the State  
of New York held in and for the County of Albany, at  
the Court House in the City of Albany, on the 28th day of  
December, 1964.

Present: Hon. Ellis J. Staley, Jr., Justice.

ORDER—April 19, 1965

Plaintiffs having brought an action for judgment declaring unconstitutional section 9 of chapter 531 of the Laws of 1964 and that part of subdivision 3 (a) of section 7 of chapter 531 of the Laws of 1964 which requires that schedules of prices to wholesalers contain the net bottle and case price paid by the seller and which requires that no brand of liquor or wine shall be sold to or purchased by a wholesaler irrespective of the place of sale or delivery unless a schedule is filed, insofar as it may require schedules of prices of sales to wholesalers in other States than New York; and plaintiffs having moved by order to show cause for an order restraining defendants pending the determination of the issues in this action from (1) requiring plaintiffs to comply in any manner with any

part of section 9, chapter 531 of the Laws of 1964, from (2) requiring those plaintiffs who sell their brands of liquor to wholesalers located in other States as well as to wholesalers in the State of New York to file a schedule of prices at which such liquor is sold to wholesalers in States other than New York "irrespective of the place of sale or delivery" as required by section 7, chapter 531 of the Laws of 1964, and from (3) requiring plaintiffs to include in their schedule of prices filed pursuant to section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by seller" as required by section 7, chapter [fol. 339] 531 of the Laws of 1954; and a stay having on October 29, 1964 been granted by Hon. Russell G. Hunt, Justice of the Supreme Court, staying defendants until the hearing and determination of the motion and the entry of the order thereon from requiring plaintiffs to comply with any part of said section 9 and with said section 7, subdivision 3 (a) as set forth in items (2) and (3) above; and defendants having made a cross-motion for an order dismissing the complaint herein, or in the alternative, for judgment declaring section 9 of chapter 531 of the Laws of 1964 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid; and said motion and cross-motion having come on to be heard before this Court on January 4, 1965, and having been argued by Thomas F. Daly, Esq., of Counsel for Lord, Day & Lord, attorneys for plaintiffs, and Ruth Kessler Toch, Assistant Solicitor General, for Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants, and due deliberation having been had thereon, and this Court having rendered its decision holding section 9 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid and denying the motion to dismiss the complaint and directing judgment in favor of the defendants declaring section 9 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid and denying plaintiffs' application for preliminary injunction;



Now, on reading and filing the order to show cause, the affidavit of Thomas F. Daly, sworn to October 28, 1964, and the exhibits attached thereto, the affidavits of Frederick J. Lind, sworn to October 20, 1964, of Joseph D. Cotler, sworn to October 21, 1964, of Raymond Revit, sworn to October 27, 1964, of Walter J. Devlin, sworn to October 23, 1964, of D. L. Street, sworn to October 20, 1964, of R. R. Herrmann, Jr., sworn to October 20, 1964, of Ira [fol. 340] R. Schattman, Jr., sworn to October 22, 1964, of Frank T. Hypps, sworn to October 28, 1964 and the exhibit attached thereto, of Jack Goodman, sworn to October 15, 1964, of Jack W. Marer, sworn to August 21, 1964 and the exhibits attached thereto, of Chester F. McNamara, sworn to August 21, 1964, of Charles W. Sand, sworn to August 25, 1964, of William Steinberg, sworn to August 25, 1964, all in support of plaintiffs' motion for temporary restraining order and preliminary injunction; the summons and verified complaint; the answer of defendants verified by Donald S. Hostetter, Chairman of the State Liquor Authority, on December 21, 1964; defendants' notice of cross-motion pursuant to CPLR 2215 for an order dismissing the complaint herein or in the alternative for judgment declaring section 9 of chapter 531 of New York Laws of 1964 and section 7, subdivision 3 (a) of chapter 531 of New York Laws of 1964 to be in all respects constitutional and valid, and the affidavits of Ruth Kessler Toch and William E. Phillips in support thereof, both sworn to December 22, 1964; the affidavit of John F. O'Connell, sworn to December 26, 1964, in opposition to defendants' said cross-motion; and on filing the opinion of this Court dated April 9, 1965, in favor of defendants, on motion of Hon. Louis J. Lefkowitz, Attorney General, attorney for defendants herein, it is

Ordered that the motion to dismiss the complaint is denied and that defendants have judgment declaring section 9 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid; and it is

Further ordered that plaintiffs' application for preliminary injunction is denied; and it is

Further ordered that the interim stay heretofore granted herein is in all respects vacated; and it is

[fol. 341] Further ordered that the Clerk of this Court is hereby directed to enter judgment in favor of defendants accordingly.

Signed: April 19, 1965

Ellis J. Staley, Jr., Justice of the Supreme Court.

Enter April 21, 1965

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[fol. 342]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

Index No. 6127-64

At a Special Term of the Supreme Court of the State of New York held in and for the County of Albany, at the Court House in the City of Albany, on the 28th day of December, 1964.

Present: Hon. Ellis J. Staley, Jr., Justice.

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Plaintiffs,  
against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants.

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JUDGMENT—April 19, 1965

An order having been signed on April 19, 1965, granting judgment to the defendants herein declaring section 9

and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 to be in all respects constitutional and valid;

Now, on motion of Hon. Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants herein, it is

Adjudged and decreed that section 9 and section 7, subdivision 3 (a) of chapter 531 of the Laws of 1964 are in all respects constitutional and valid.

Signed: April 19, 1965.

Ellis J. Staley, Jr., Justice of the Supreme Court.

Enter April 21, 1965

To:

Louis J. Lefkowitz, Esq., Attorney General of the State of New York, Attorney for Defendants, The Capitol, Albany 1, New York.

[fol. 343]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

NOTICE OF APPEAL—April 21, 1965

Sirs:

Please Take Notice, that the plaintiffs above named hereby appeal to the Appellate Division of the Supreme Court of New York, Third Department, from so much of the order of Mr. Justice Ellis J. Staley, Jr. dated the 19th day of April, 1965 and entered in the office of the Clerk of Albany County on the 21st day of April, 1965 as denies the plaintiffs' motion for a preliminary injunction and grants the defendants' motion for a declaratory judgment, and from the judgment entered thereon in the office of the Clerk of Albany County on the 21st day of April, 1965.

Dated: New York, N. Y., April 21, 1965.

Yours, etc.

Lord, Day & Lord, Attorneys for Plaintiffs, Office &  
P. O. Address, 25 Broadway, New York, N. Y.  
10004.

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[fol. 344]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT  
—8017

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Appellants,

v.

DONALD S. HOSTETTER, *et al.*, Constituting the State Liquor  
Authority, and LOUIS J. LEFKOWITZ, Attorney General of  
the State of New York, Respondents.

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OPINION—May 13, 1965

Per Curiam.

Appeal (1) from so much of an order of the Supreme Court at Special Term as denied plaintiffs' motion for a preliminary injunction and granted defendants' cross-motion for summary judgment awarding declaratory judgment, as demanded in the counterclaim, that certain acts amendatory of the Alcoholic Beverage Control Law are constitutional and otherwise valid, and (2) from the judgment entered upon said order. (Opinion: Misc. 2d .) Motion for a temporary restraining order.

The action is brought by distillers, importers and wholesalers of liquor sold in New York for judgment (1) declaring that the provisions of section 9 of chapter 531 of the Laws of 1964, amending subdivision 3 of section 101-b of the Alcoholic Beverage Control Law, and certain

of the provisions of section 7 of said chapter, amending paragraph (a) of subdivision 3 of section 101-b of the same act, are invalid as violative of the commerce and [fol. 345] supremacy clauses of the Constitution of the United States (U. S. Const., art. 1, §8, cl. 3; art. VI, cl. 2) and as violative, also, of the due process and equal protection clauses of the Constitutions of the United States and the State of New York (U. S. Const., 14th Amdt., §2; N. Y. Const., art. I, §§6, 11), and (2) enjoining the imposition of penalties for failure of compliance with such allegedly invalid provisions.

Appellants' many-pronged attack is directed principally to the provisions requiring, in substance, that each distiller and wholesaler offer New York purchasers in respect of each brand sold by him a price no higher than the lowest price at which such item was sold elsewhere in the United States as shown by schedules and affirmations required to be filed by him.

The case thus involves important constitutional questions respecting legislation of social consequence and of wide application; it is well and thoroughly briefed and is presented upon an adequate record; it will, most likely, be further reviewed; and under all these circumstances we deem it the function of this intermediate appellate court to reach its determination promptly and to state it succinctly and without elaboration.

The legislative policy sought to be effectuated by the amendments in dispute was declared to be, among other things, to foster price competition, to eliminate discrimination against New York consumers and "to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination", price discrimination and favoritism being found "contrary to the best interests and welfare of the people of this state." (L. 1964, ch. 531, §8.)

Neither in the record nor in appellants' argument do we find a substantial basis for the assertion that equal protection has been denied. In the light of the legis-

lative history and studies and, so far as applicable, the [fol. 346] studies and reports of the Moreland Act Commission, and upon our finding that the strong supportive presumptions have not been overcome, we conclude that the enactment constitutes a valid exercise of the police power and effects no deprivation of due process.

Appellants argue forcefully that the maximum price provisions of the amendments contravene the Robinson-Patman Act (U. S. Code, tit. 15, §§ 13 *et seq.*) and the Sherman Act (U. S. Code, tit. 15, §§ 1-7), and thus are violative of the supremacy clause and the challenged amendments offend the commerce clause as well. The complete answer is, we believe, that the legislation lies well within the area of liquor traffic regulation in which, under the Federal Constitution, effective control may be exercised by the States. (U. S. Const., 21st Amdt., §2; *State Bd. of Equalization v. Young's Market Co.*, 299 U. S. 59; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U. S. 391; *Finch & Co. v. McKittrick*, 305 U. S. 395.) The later authorities, upon which appellants principally rely (see, e. g., *United States v. Frankfort Distilleries*, 324 U. S. 293; *Hostetter v. Idlewild Bon Voyage Liqueur Corp.*, 377 U. S. 324; *Department of Revenue v. James B. Beam Distilling Co.*, 377 U. S. 341), seem readily distinguishable from the older cases, above cited, and from the case before us. In *Frankfort* was involved a criminal prosecution, which the Court held (p. 299) was not barred by the 21st Amendment, which "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries"; and the Court was careful to point out (p. 299) that the Sherman Act "is not being enforced in this case in such manner as to conflict with the law of Colorado." Unlike the case before us, neither *Idlewild* nor *Beam* concerned an attempt by a State to exert *internal* control, within the ambit of the 21st Amendment, but, rather, involved taxing procedures long recognized as illegal.

[fol. 347] Appellants' remaining contentions seem to us unsubstantial and do not require discussion.

Judgment affirmed, with costs. Motion for temporary restraining order denied, without costs. Application for permission to appeal to the Court of Appeals granted, without costs.

Gibson, P. J., Herlihy, Taylor, Aulisi and Hamm, JJ., concur.

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[fol. 348]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT

At a Term of the Appellate Division of the Supreme Court in and for the Third Judicial Department, held at the Courthouse in the City of Albany, New York, commencing on the 26th day of April, 1965.

Present: Hon. James Gibson, Presiding Justice. Hon. J. Clarence Herlihy, Hon. Donald S. Taylor, Hon. Felix J. Aulisi, Hon. Herbert D. Hamm, Associate Justices.

County Clerk's Index No. 6127—64.

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*, Appellants,  
against

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Respondents.

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ORDER OF AFFIRMANCE AND GRANTING LEAVE TO APPEAL TO  
COURT OF APPEALS—May 14, 1965

Plaintiffs having appealed from the judgment of the Supreme Court, Albany County, entered in the office of the



Clerk of Albany County on the 21st day of April, 1965, declaring Section 9 and Section 7, subdivision 3(a) of Chapter 531 of the Laws of 1964 to be in all respects constitutional and valid, and from the order of the Supreme Court, [fol. 349] Albany County, entered in the office of the Clerk of Albany County on the 21st day of April, 1965, pursuant to which order said judgment was entered, and from the denial by said order of plaintiffs' motion for preliminary injunction and the granting by said order of defendants' cross-motion for a declaratory judgment, and said appeal having been presented during the above stated term of this Court, and having been argued by Thomas F. Daly, Esq., of Counsel for the appellants, and by Ruth Kessler Toch, Esq., Assistant Solicitor General, of Counsel for respondents, and, after due deliberation, the Court having rendered a decision on the 13th day of May, 1965, it is hereby

Ordered, that the judgment of the Supreme Court be and it hereby is affirmed with costs; the motion for temporary restraining order is denied without costs; application for permission to appeal to the Court of Appeals is granted without costs.

Enter:

John J. O'Brien, Clerk.

Dated and Entered: May 14, 1965.

John J. O'Brien, Clerk.

[fol. 350]

CERTIFICATION PURSUANT TO CPLR, SECTION 2105—  
May 20, 1965

I, GENE R. McHAM, an attorney duly admitted and licensed to practice in the State of New York and associated with Lord, Day & Lord, attorneys for the plaintiffs-appellants in this action, do hereby certify, pursuant to CPLR, Section 2105, that the foregoing printed record on appeal to the Appellate Division, Third Department, and the foregoing printed additional papers to the Court of Appeals

consisting of the order of the Appellate Division appealed from and granting leave to appeal to the Court of Appeals and the opinion of the Appellate Division have been personally compared by me with the original record on appeal to the Appellate Division, Third Department, and said additional papers to the Court of Appeals and found to be true and complete copies of the said originals and the whole thereof now on file in the office of the Clerk of the County of Albany and in the office of the Clerk of the Appellate Division, Third Department.

Dated: May 20, 1965.

Gene R. McHam.

[fol. 351]

IN THE COURT OF APPEALS FOR THE STATE OF NEW YORK

JOSEPH E. SEAGRAM & SONS, INC., et al., Appellants, v. DONALD S. HOSTETTER et al., Constituting the State Liquor Authority, et al., Respondents.

OPINION—July 9, 1965

Appeal, by permission of the Appellate Division of the Supreme Court in the Third Judicial Department, from an order of said court, entered May 14, 1965, which unanimously affirmed a judgment of the Supreme Court, entered in Albany County upon an order of the court at Special Term (Ellis J. Staley, Jr., J.; opinion 45 Misc 2d 956) declaring section 7 (subd. 3 par. [a]) and section 9 of chapter 531 of the Laws of 1964 constitutional and valid.

*Thomas F. Daly, Herbert Brownell, Gerald A. Navagh and Gene R. McHam* for appellants.

*Louis J. Lefkowitz, Attorney-General (Ruth Kessler Toch, Paxton Blair and Robert L. Harrison of counsel),* for respondents.

*Harold E. Blodgett* for Service Liquor Distributors, Inc., and another, *amici curiae*.

Bergan, J. In 1963 in response to malfunctions in the administration of the State's liquor law and public dissatisfaction with controls on the sale of alcoholic beverages, the Governor appointed a Moreland Commission directed to make a "study and reappraisal" of the law.

In appointing the commission the Governor noted that since the enactment of the Alcoholic Beverage Control Law in 1934, soon after the end of prohibition, there had been "no major reappraisal or revision of the law in the light of experience and current social problems and economic conditions".

The commission addressed itself, among other things, to the price of liquor in New York and the effect of price on temperance in the use of liquor. One of the basic assumptions of the statute then in effect was that, if the price of liquor were cheap, its consumption would increase and the policy effected by the statute was to sustain the price.

Former section 101-c of the Alcoholic Beverage Control Law had authorized a manufacturer who was a "brand" owner to fix the minimum retail prices for that brand, for the violation of which the retailer was subject to discipline by the State Liquor Authority (subd. 7). The statute (§ 101-b, subd. 3) had for over 20 years also provided for filing price schedules by brand owners and wholesalers.

The commission's studies led it to believe that the assumed favorable relation of high-priced liquor to temperance was chimerical. The prices of liquor in New York were high, but consumption had steadily risen and this did [fol. 352] not indicate high prices increased temperance. It found "a greater than average" increase in per capita consumption in New York (Moreland Comm. Report No. 1, p. 3).

The principal benefit from the minimum price requirement for liquor in New York went to the liquor interests. This served "merely", said the commission, "to insure profit margins of the various segments of the industry" (Report No. 3, p. 19, offered as Exhibit E by plaintiffs at Special Term) and "The argument that high prices promote tem-

perance in that they keep liquor out of the hands of those who should not have it" is "unfounded" (*id.*, p. 17).

Its studies showed no correlation between consumption and prices, looking at the experience in States in which prices were high compared with those in which they were low.

It found in effect gross price discrimination against the New York consumer by the industry. It developed that the retail price for a fifth of a well-known brand of liquor was lower in Washington, D. C. than the wholesale price in New York. One brand, for example, cost \$2.85 retail in Washington and \$3.45 wholesale in New York, another \$3.39 and \$4.15 respectively (see Report No. 3, pp. 5, 6).

This report adds: "For almost every fifth of whiskey that he buys, the New York consumer pays 50 cents to \$1.50 more than the price at which it is available in at least seven freer price markets" (p. 3).

On the basis of these reports the Governor made recommendations to the Legislature (Message, Feb. 10, 1964). He observed that the administration of the State's liquor law had been marked by "periodic instances of corruption and favoritism". He noted the favored position of the liquor industry in an area which was the subject of public regulation and that the Moreland Commission had reported "it is contrary to the public interest to have the regulated industry in such a dominant role". He added that the commission had sought means of "Bringing justice to the consumer by putting to an end the artificial devices whereby the liquor industry has received uniquely beneficial treatment at the consumer's expense."

The Governor also noted that as a result of the distiller-fixed consumer prices under the statute a "surcharge" had been "foisted on New Yorkers" of \$150 million a year over what would have been paid in a free market.

The result of the commission study and the Governor's recommendations was the enactment of a statute by the Legislature (L. 1964, ch. 531) which, among other things, vitally changed the direction of liquor price policy in New York and sought to reduce consumer prices.

This suit is maintained by 62 distillers and wholesalers of alcoholic beverages and some importers against the State Liquor Authority and the Attorney-General to declare the [fol. 353] provisions of the 1964 statute invalid. The main attack is directed to section 9 of the statute; the other is directed to certain parts of section 7. The court at Special Term in a comprehensive opinion granted judgment for defendants; the Appellate Division affirmed.

In changing the direction of its policy which had been to prevent prices from going too low by establishing effective devices pursuant to which the liquor industry could in effect fix minimum retail prices on brand liquors, the Legislature by section 9 of the 1964 statute set up means which sought to keep down the prices of brand liquors to the consumer. The mechanism is a simple one and it lies technically in the control of the liquor industry. But it is a mechanism to which plaintiffs take vigorous exception on a diversified number of grounds.

The provision is this: On filing the schedules of brand owners' prices to wholesalers, which for 20 years had to be filed monthly under the former provisions of section 101-b, the brand owner or his designee must file an affirmation "that the bottle and case price" to wholesalers in New York "is no higher than the lowest price at which such item of liquor" was sold the previous month to any wholesaler elsewhere in the country or any State or State agency operating a public liquor enterprise (§ 9).

Thus it was sought to end the discrimination by the liquor industry against the New York consumer which, as the commission had found, cost the New York consumer \$150 million a year above that which a free market would have offered.

This change from a favored and protected profit position to a possibly sparse profit situation may make it economically difficult for the liquor industry. If it does it is within the competence of the New York Legislature to make it that way. Even without article XXI of the Amendments to the United States Constitution, New York could end the

liquor traffic within its borders entirely. The State of Mississippi, for example, prevents the plaintiffs or anyone else from selling liquor there and no one doubts its power to do so. But the Twenty-first Amendment spells out an additional specific and federally protected right of each State to eliminate as well as regulate the liquor traffic within its borders (*Mahoney v. Triner Corp.*, 304 U. S. 401).

A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture.

If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of opinion they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers.

[fol. 354] In effect the dependence of the New York price on the maximum price of the distiller for his brand elsewhere is to tie the price in this State in to a national price. There is nothing unreasonable about that. It is not an interference with interstate commerce. The effect is on what the distiller charges here and is an effect closely associated with the sale and distribution of liquor within the State.

That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a device within the power of the State to employ in this regulated activity.

There is in the record proof offered at Special Term by plaintiffs in an exhibit (Exhibit C attached to the affidavit of Thomas F. Daly) consisting of excerpts of the testimony before a legislative committee of Judge Lawrence E. Walsh,

the Moreland Commissioner, who personally opposed the kind of regulation prescribed by section 9, in which the statement is made that in the liquor industry "the whole sum total of that relationship averages out to a price that is average across the country".

He cited Pennsylvania, a monopoly State, "the largest purchaser of liquor in the world \* \* \* \$400,000,000 worth of liquor a year—one customer" as being an example of a customer who insists "on the lowest price that the distiller offers anywhere in the country".

In the light of this kind of national marketing situation, the actual difficulty of the distiller in seeing to it that the New York buyer pays no more than "the lowest price" elsewhere seems greatly overstressed.

Under section 9 the distillers themselves control the base price since they fix the lowest price elsewhere. If its effect on New York is too low a price they have it within their power to raise the lowest price elsewhere. The industry must absorb any differential cost in doing business as one of the incidents to a highly regulated industry. The incidental effect of this on prices in another State does not invalidate the New York statute.

The requirement of section 9 is not, indeed, unusual in concept and those States which have State liquor monopolies, we are told, require the distillers to warrant that the price charged the State monopoly for brand liquors is no higher than the price charged in other States. Thus we think the price regulation in the 1964 statute is neither impossible of compliance nor unreasonable.

It is thoroughly settled that when it comes to the regulation of liquor traffic a wide area of public power may be exercised in plenary fashion by State governments without Federal interference either under the commerce clause or under the equal protection provisions of the Constitution.

A leading decision is *State Bd. v. Young's Market Co.* (299 U. S. 59) where the court in an opinion by Mr. Justice [fol. 355] Brandeis sustained a State statute imposing a license fee for the privilege of importing beer from other



States against the argument that it violated both the commerce clause and the equal protection clause.

In the same direction is *Mahoney v. Triner Corp.* (304 U. S. 401, *supra*); again in an opinion by Justice Brandeis the court sustained a Minnesota statute imposing additional processing conditions on liquor coming from other States, a statute which the court noted "clearly discriminates in favor of liquor processed within the State against liquor completely processed elsewhere" (p. 403).

Similarly discriminating statutes in Michigan which prohibited dealers in beer there from selling beer manufactured in other States which in turn discriminated against beer manufactured in Michigan (*Brewing Co. v. Liquor Comm.*, 305 U. S. 391) and to the same effect in Missouri (*Finch & Co. v. McKittrick*, 305 U. S. 395) were each sustained. The statute before us could scarcely be deemed to have as much impact on the plaintiffs' Federal rights as these.

In *Ziffrin, Inc. v. Reeves* (308 U. S. 132, 138) a Kentucky statute confining the transportation of liquor to licensed common carriers was sustained, with Mr. Justice McReynolds propounding the question: "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions?" And making the answer: "Former opinions here make affirmative answer imperative."

As the Appellate Division opinion noted, nothing in the later decisions of the court upon which appellants mainly rely suggests that the basic power of New York to control the liquor traffic has been impaired. The holding of *United States v. Frankfort Distilleries* (324 U. S. 293) is merely that liquor producers, wholesalers and retailers may not conspire unlawfully to fix prices in violation of the Sherman Anti-Trust Act (U. S. Code, tit. 15, § 1 *et seq.*). Nothing in that decision sustains any part of plaintiffs' contention.

And *Hostetter v. Idlewild Liq. Corp.* (377 U. S. 324) and *Department of Revenue v. James Beam Co.* (377 U. S. 341)

are irrelevant to the case before us. The principles announced in the earlier cases were re-enforced in 1958 in the denial of the application of California to file a bill of complaint against Washington (*California v. Washington*, 358 U. S. 64).

On the general exercise of State powers in matters affecting the welfare of a State and its people, liquor aside, see *Hoopeston Co. v. Cullen* (318 U. S. 313); *Huron Cement Co. v. Detroit* (362 U. S. 440); *Osborn v. Ozlin* (310 U. S. 53).

The provisions of section 9 are not transformed into an "anti-trust measure" in conflict with the supremacy clause [°ol. 356] on the basis of plaintiffs' conception that the statute is not "a device to promote temperance"; nor are they for similar reasons in conflict with the Robinson-Patman Act (U. S. Code, tit. 15, § 13 *et seq.*). It is a strained argument to make, as plaintiffs do, that compliance with the compulsion of a public statute which seeks to keep down the price of liquor is the equivalent of an unlawful conspiracy to violate the Sherman Act; and it is almost equally strange to say that, because New York tries to correct an evil in the sale of liquor by providing price criteria operative here, it "will \* \* \* impair \* \* \* the successful operation of alcoholic beverage control laws in other states".

Plaintiffs also attack the validity of portions of section 7 of the 1964 statute which require that filed price schedules show the bottle and case price paid by a retailer, and the portion of the section which prohibits sale or purchase by a wholesaler unless schedules are filed by brand owners "irrespective of the place of sale or delivery".

It is said by appellants that those requirements "can only mean" that sales by brand owners "in every state" must be filed with the New York Authority.

The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered

consistently with its sole purpose to regulate the intra-state sale of liquor.

Throughout the argument of plaintiffs on constitutional and other issues runs the thread of their contention that the 1964 statute is not suited to the promotion of temperance and hence the main justification of a valid regulation of liquor is lost.

In summarizing their position in a reply brief plaintiffs say: "At issue here is whether Section 9 of Ch. 531 affirmatively promotes temperance". As to what best promotes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry.

The order should be affirmed, with costs.

Chief Judge DESMOND (dissenting). Of plaintiffs' several serious and impressive arguments against the validity of sections 7 and 9 of chapter 531 of the Laws of 1964, one remains unanswered and to my mind unanswerable. It comes down to this: mandatory establishing of minimum prices for sales by bottle or case of "brand name" alcoholic beverages is beyond the power of our State legislation, is an unconstitutional (U. S. Const., 5th and 14th Amdts.; N. Y. Const., art. 1, § 6) taking of private property without due process or compensation, and is not justified as a police power exercise since it is not necessary for or related to the health, safety, morals or welfare of the State's inhabitants or required by any emergency. Bringing New [fol. 357] York State liquor prices into line with those of comparable localities may accord with some concepts of fairness, and our people may have cause to complain about marketing and pricing practices of plaintiffs which are said to result in the charging of premium prices in the package stores of New York State. But we are talking now about constitutional protections against arbitrary interferences by government with free price markets. Statutory price controls on food, housing accommodations or other essentials of life is a valid exercise of the State's far-ranging police power which is born out of public needs (*Nebbia v.*

*New York*, 291 U. S. 502, 525 *et seq.*). Those items are regulated as to price because they are among the "great public needs" referred to in *People v. Nebbia* (262 N. Y. 259, 270). But even the police power is limitable and the courts have the same duty to nullify unconstitutional legislative acts as to uphold statutes which satisfy or tend to satisfy or may reasonably be expected to satisfy some health, safety or welfare need. If no such relevance is discoverable, a statute infringing on the constitutionally protected rights of private property in price-fixing or similar restraints must fall (*Defiance Milk Prods. Co. v. Du Mond*, 309 N. Y. 537; *Trio Distr. Corp. v. City of Albany*, 2 N Y 2d 690; *Loblaw, Inc. v. New York State Bd. of Pharmacy*, 11 N Y 2d 102). In each of those three cases we held a statute violative of due process because it needlessly and arbitrarily forbade an otherwise valid business practice.

No one will question the traditional rights of the States (taken away by the Eighteenth Amendment but restored by the Twenty-first) under their inherent police power to prohibit, restrain or regulate the manufacture, sale and use of intoxicants (*Matter of Trustees of Calvary Presbyt. Church v. State Liq. Auth.*, 245 App. Div. 176, 178, *affd.* 270 N. Y. 497; *Mahoney v. Triner*, 304 U. S. 401). The New York Legislature has power to enact a variety of laws calculated to suppress intemperance or to minimize the known evils of the liquor traffic, since the trade is one as to which there is a recognized public interest. But "police power" is not a magic incantation to frighten off judicial investigation into the constitutionality of statutes. The State of New York could completely outlaw the sale of liquor but, having chosen instead to regulate it, the restrictions and requirements can be such only as are necessary to protect public safety, health and morals from the evils, known or apprehended, of the trade. The State's licensees may be subjected to the strictest supervision and control (as scores of appellate court decisions in this State attest) but such supervision and control must at least tend to preserve public order and discourage the intemperate use of alcohol. No

one has yet told us how any of these lawful purposes could be accomplished or furthered by forcing liquor prices down to the bottom level found anywhere in the United States. To promote temperance by making intoxicants cheaper is like [fol. 358] trying to minimize the dangers of excessive smoking by abolishing cigarette taxes.

This statute cannot be saved by recourse to the familiar aphorisms about presuming a statute's constitutionality or presuming that investigation has shown necessity, or avoiding the substitution of a court's judgment for a Legislature's, or the like. Those who attack a price-fixing law have the burden of showing its unconstitutionality beyond any reasonable doubt (*Lincoln Bldg. Assoc. v. Barr*, 1 N Y 2d 413) but that burden is met when the attackers show as they do here that the only reason suggested or available for its enactment—that is, eliminating “price discrimination” against our State’s residents has no relationship to any public need or evil of the kind which justifies use of the police power (*Defiance Milk Prods. Co. v. Du Mond*, 309 N. Y. 537, 540-541, *supra*). Indeed, in section 8 of those 1964 amendments to section 101-b of the Alcoholic Beverage Control Law, the Legislature has forthrightly told us that its purpose and interest was solely to reduce the prices charged for brand-name liquor in this State. That was a long retreat from the old announced policy (see old § 101-c as enacted in 1950) of promoting temperance by eliminating price wars, by prohibiting sales below announced minima and by mandating resale price maintenance. It is a *non sequitur* that, since artificially jacking up the prices under earlier statutes did not promote temperance, forcing them down to the lowest levels in the whole country will be a step toward moderation in use.

It is suggested that we should respect and accept the judgment of the Legislature and the Governor that price limitation will further temperance. But the assumption that such was the purpose runs against the declared fact. Neither the Governor nor the Legislature ever offered such

a vain argument, and we must remember that sections 7 and 9 were not among the recommendations of the distinguished Moreland Act Commissioners appointed by the Governor. Temperance is a laudable objective and a proper State purpose but no one has the temerity to assert that cut-price liquor cuts down drinking. Therefore, it follows of absolute necessity that these amendments have nothing to do with the State policy written into section 2 of the State Alcoholic Beverage Control Law right after repeal of National Prohibition: "to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law."

Even if these statutes could survive Federal constitutionality tests they are void for arbitrariness under our own decisions such as *Defiance Milk Prods. Co. v. Du Mond* (309 N. Y. 537, *supra*); *Trio Distr. Corp. v. City of Albany* (2 N Y 2d 690, *supra*); *Grove Hill Realty Co. v. Ferncliff* [fol. 359] *Cemetery Assn.* (7 N Y 2d 403, 410), and *Loblaw, Inc. v. New York State Bd. of Pharmacy* (11 N Y 2d 102, *supra*). Police power statutes under the New York State Constitution are valid only if the legislation is addressed to a legitimate end and, also, if the measures taken are reasonable and appropriate to that end (*Matter of People* [*Tit. & Mtge. Guar. Co.*], 264 N. Y. 69, 83)—that is, such a statute must be "reasonably related and applied to some actual and manifest evil". (*Defiance Milk Prods. Co. v. Du Mond*, *supra*, p. 541; *Twentieth Century Assoc. v. Waldman*, 294 N. Y. 571, 580, app. dsmd. 326 U. S. 697; *East N. Y. Sav. Bank v. Hahn*, 293 N. Y. 622, 627, *affd.* 326 U. S. 230; *Matter of Department of Bldgs. of City of N. Y.* [*Philco Realty Corp.*], 14 N Y 2d 291, 297). The only "evil" against which this legislation is directed is found, apparently, in the fact that some people somewhere in this country under other unknown and uninvestigated conditions buy liquor more cheaply than we do. If this be good law, similar statutes may be passed as to any sale-licensed commodity.

I do not, although I do not discuss them at length, overlook a number of other troublesome aspects of these amendments. These difficulties may be summed up by the statement that it is wholly arbitrary to force New York State liquor prices down to the lowest level prevailing anywhere in America, despite higher license fees charged in this State, despite higher wages and salaries here (and conversely a small volume of sales by some of the distributors-plaintiffs), despite the fact that abnormally low prices somewhere in the country may be due to temporary conditions totally unrelated to New York State prices, and despite the predictable and remarkable result that the distillers now may (or must) raise prices elsewhere in order to reap even a better harvest in the enormous New York State market.

The judgment should be reversed and judgment directed for plaintiffs as demanded in the complaint, with costs in all courts.

Judges DYE, VAN VOORHIS and SCILEPPI concur with Judge BERGAN; Chief Judge DESMOND dissents and votes to reverse in an opinion in which Judges FULD and BURKE concur.

Order affirmed.

[fol. 360] TRIPLE CERTIFICATE TO FOREGOING PAPER (omitted in printing).



[fol. 361]

IN THE COURT OF APPEALS FOR THE STATE OF NEW YORK  
State of New York, ss:

Pleas in the Court of Appeals, held at Court of  
Appeals Hall, in the City of Albany, on the  
9th day of July in the year of our Lord  
one thousand nine hundred and sixty-five,  
before the Judges of said Court.

Witness, The Hon. Charles S. Desmond, Chief Judge,  
Presiding.

Raymond J. Cannon, Clerk.

REMITTITUR—July 9, 1965

[fol. 362]

3.

No. 249

65

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JOSEPH E. SEAGRAM & SONS, INC., & ORS., Appellants,

VS.

DONALD S. HOSTETTER, Chairman, & ORS., constituting the  
State Liquor Authority, and LOUIS J. LEFKOWITZ, At-  
torney General of the State of New York, Respondents.

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Be it Remembered, That on the 27th day of May in the  
year of our Lord one thousand nine hundred and sixty-five,  
Joseph E. Seagram & Sons, Inc., & ORS., the appellants in  
this cause, came here unto the Court of Appeals, by Lord,  
Day & Lord, their attorneys, and filed in the said Court a  
return thereto from the order of the Appellate Division of  
the Supreme Court in and for the Third Judicial Depart-  
ment. And Donald S. Hostetter, Chairman, & ORS., con-  
stituting the State Liquor Authority, and Louis J. Lef-  
kowitz, Attorney General of the State of New York, the  
respondents in said cause, afterwards appeared in said  
Court of Appeals by Louis J. Lefkowitz, Attorney General,  
who also appeared pro se.

Which said return thereto, filed as aforesaid, are hereunto annexed.

[fol. 363] Whereupon, The said Court of Appeals having heard this cause argued by Mr. Thomas F. Daly, of counsel for the appellants, and by Ruth Kessler Toch, of counsel for the respondents, brief filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

[fol. 364] Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Raymond J. Cannon, Clerk of the Court of Appeals  
of the State of New York.

Court of Appeals, Clerk's Office, Albany, July 9, 1965.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

(Seal)

Raymond J. Cannon, Clerk.

[fol. 365]

IN THE SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

At a Special Term of the Supreme Court held  
in and for the County of Albany, at the  
County Court House in the City of Albany,  
New York, on the 16th day of July, 1965.

Present: Hon. Ellis J. Staley, Jr., Justice.

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JOSEPH E. SEAGRAM & SONS INC., THE HOUSE OF SEAGRAM,  
INC., STITZEL-WELLER DISTILLERY, INC., THE PADDINGTON  
CORPORATION, HIRAM WALKER INCORPORATED, GOODERHAM  
& WORTS LIMITED, JAS. BARCLAY & Co., LIMITED, W. A.  
TAYLOR & COMPANY, HIRAM WALKER DISTRIBUTORS, INC.,  
THE AMERICAN DISTILLING COMPANY, MCCORMICK DIS-  
TILLING COMPANY, THE FLEISCHMANN DISTILLING COR-  
PORATION, MR. BOSTON DISTILLER INC., THE VIKING DIS-  
TILLERY, INC., JAMES B. BEAM DISTILLING COMPANY,  
JAMES B. BEAM IMPORT CORPORATION, SCHENLEY INDUS-  
TRIES, INC., AFFILIATED DISTILLERS BRANDS CORP., KNICK-  
ERBOCKER LIQUORS CORP., BARTON DISTILLING COMPANY,  
BARTON DISTILLERS IMPORT CORPORATION, JULIUS WILE  
SONS & COMPANY, INC., BACARDI IMPORTS, INC., AUSTIN  
NICHOLS & COMPANY, INC., CANADA DRY CORPORATION,  
HEUBLEIN INC., MCKESSON & ROBBINS, INC., NATIONAL  
DISTILLERS AND CHEMICAL CORPORATION, PUBLICKER DIS-  
TILLERS PRODUCTS, INC., WAYNE LIQUOR CORP., BROWN  
FORMAN DISTILLERS CORPORATION, GLENMORE DISTILLERIES  
COMPANY, A. SMITH BOWMAN DISTILLERY INC., "21"  
BRANDS, INC., STAR HILL DISTILLING COMPANY, SCHIEF-  
FELIN & COMPANY, ALPINE WINE & LIQUOR CORP., BEN  
PERLOW LIQUOR CORP., BISON LIQUOR Co., INC., BLUE  
CREST WINE AND SPIRIT CORP., BONNY DISTRIBUTING Co.,  
INC., CAPITAL DISTRIBUTORS CORP., CARDINAL DISTRIBUT-  
ORS INC., COLONY LIQUOR DISTRIBUTORS, INC., DISTILLED  
BRANDS, INC., EBER BROS. WINE & LIQUOR CORP., ELMIRA

TOBACCO CO., INC., EMPIRE LIQUOR CORP., GRAVES & RODGERS, INC., M. LICHTMAN & CO., INC., MAJOR LIQUOR DISTRIBUTORS, INC., MONARCH LIQUOR CORP., MULLEN & GUNN, INC., PEERLESS IMPORTERS CORP., RAMAPO WINE & LIQUOR CORPORATION, ROCHESTER LIQUOR CORPORATION, RODGERS LIQUOR CO., INC., S & K WINE & LIQUOR CORP., STANDARD FOOD PRODUCTS CORP., STANDARD WINE & LIQUOR CO., INC., STAR INDUSTRIES INC., UNIVERSAL LIQUOR CORP., Plaintiffs,

—against—

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants.

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#### ORDER ON REMITTITUR

Plaintiffs above named having appealed to the Court of Appeals from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department, entered on May 14, 1965 in the office of the Clerk of the [fol. 366] Appellate Division, which order affirmed with costs the order and judgment of the Supreme Court, entered in the office of the Clerk of Albany County on April 21, 1965, in favor of defendants, declaring § 9 and § 7, subdivision 3 (a), of Chapter 531 of the Laws of 1964 to be in all respects constitutional and valid, and denying plaintiffs' motion for a preliminary injunction; and said appeal having been argued in the Court of Appeals by Thomas F. Daly, Esq., of Counsel for Appellants, and Ruth Kessler Toch, Assistant Solicitor General, of Counsel for the Respondents, and after due deliberation had thereon the Court of Appeals having made its decision and having ordered and adjudged that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed with costs, and having further ordered that the records

aforesaid and the proceedings in the Court of Appeals be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein, dated July 9, 1965, and upon motion of Louis J. Lefkowitz, Attorney General of the State of New York, attorney for defendants herein, it is

Ordered, that the said order and judgment of the Court of Appeals be and it is hereby made the order and judgment of this Court; and it is further

Ordered, that the Clerk of the County of Albany enter judgment against the plaintiffs for said costs to be taxed.

### Enter

Ellis J. Staley, Jr., Justice of the Supreme Court.

Office of Albany, County Clerk, Jul 19 10 01 AM '65,  
Albany, N. Y.

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[fol. 367]

IN THE SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

County Clerk's Index No. 6127/64

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JOSEPH E. SEAGRAM & SONS INC., THE HOUSE OF SEAGRAM, INC., STITZEL-WELLER DISTILLERY, INC., THE PADDINGTON CORPORATION, HIRAM WALKER INCORPORATED, GOODERHAM & WORTS LIMITED, JAS. BARCLAY & CO., LIMITED, W. A. TAYLOR & COMPANY, HIRAM WALKER DISTRIBUTORS, INC., THE AMERICAN DISTILLING COMPANY, McCORMICK DISTILLING COMPANY, THE FLEISCHMANN DISTILLING CORPORATION, MR. BOSTON DISTILLER INC., THE VIKING DISTILLERY, INC., JAMES B. BEAM DISTILLING COMPANY, JAMES B. BEAM IMPORT CORPORATION, SCHENLEY INDUSTRIES, INC., AFFILIATED DISTILLERS BRANDS CORP., KNICKERBOCKER LIQUORS CORP., BARTON DISTILLING COMPANY,

BARTON DISTILLERS IMPORT CORPORATION, JULIUS WILE SONS & COMPANY, INC., BACARDI IMPORTS, INC., AUSTIN NICHOLS & COMPANY, INC., CANADA DRY CORPORATION, HEUBLEIN INC., MCKESSON & ROBBINS, INC., NATIONAL DISTILLERS AND CHEMICAL CORPORATION, PUBLICKER DISTILLERS PRODUCTS, INC., WAYNE LIQUOR CORP., BROWN FORMAN DISTILLERS CORPORATION, GLENMORE DISTILLERIES COMPANY, A. SMITH BOWMAN DISTILLERY INC., "21" BRANDS, INC., STAR HILL DISTILLING COMPANY, SCHIEFFELIN & COMPANY, ALPINE WINE & LIQUOR CORP., BEN PERLOW LIQUOR CORP., BISON LIQUOR CO., INC., BLUE CREST WINE AND SPIRIT CORP., BONNY DISTRIBUTING CO., INC., CAPITAL DISTRIBUTORS CORP., CARDINAL DISTRIBUTORS INC., COLONY LIQUOR DISTRIBUTORS, INC., DISTILLED BRANDS, INC., EBER BROS. WINE & LIQUOR CORP., ELMIRA TOBACCO CO., INC., EMPIRE LIQUOR CORP., GRAVES & RODGERS, INC., M. LICHTMAN & CO., INC., MAJOR LIQUOR DISTRIBUTORS, INC., MONARCH LIQUOR CORP., MULLEN & GUNN, INC., PEERLESS IMPORTERS CORP., RAMAPO WINE & LIQUOR CORPORATION, ROCHESTER LIQUOR CORPORATION, RODGERS LIQUOR CO., INC., S & K WINE & LIQUOR CORP., STANDARD FOOD PRODUCTS CORP., STANDARD WINE & LIQUOR CO., INC., STAR INDUSTRIES INC., UNIVERSAL LIQUOR CORP., Plaintiffs-Appellants,

—against—

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York, Defendants-Appellees.

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NOTICE OF APPEAL TO THE SUPREME COURT OF THE  
UNITED STATES—Filed July 23, 1965

I. Notice is hereby given that Joseph E. Seagram & [fol. 368] Sons, Inc., et al., the plaintiffs-appellants above-named, hereby appeal to the Supreme Court of the United

States from the order of affirmance of the State of New York Court of Appeals entered in this action on July 9, 1965, affirming an order of the Appellate Division of the Supreme Court, Third Judicial Department, entered May 14, 1965, which affirmed an order of the Supreme Court, Albany County, entered April 21, 1965, denying plaintiffs-appellants' motion for temporary injunction and granting defendants-appellees' cross-motion for declaratory judgment.

This appeal is taken pursuant to 28 U.S.C.A. § 1257(2).

II. The Clerk will please prepare a certified copy of the record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in said certified copy the following:

Remittitur of the Court of Appeals, State of New York, including the record on appeal to said Court of Appeals and the order of affirmance by said Court of Appeals dated July 9, 1965.

Order on Remittitur of the Supreme Court of the State of New York, Albany County, entered July 19, 1965.

III. The following questions are presented by this appeal.

1. Does the Twenty-first Amendment to the Constitution of the United States permit the New York State Legislature to enact laws violative of other federal constitutional guarantees?

[fol. 369] 2. Does Section 9 of Ch. 531 of the New York Session Laws, 1964, violate Article VI of the Constitution of the United States?

3. Does Section 9 of Ch. 531 of the New York Session Laws, 1964, violate Article I, Section 8 of the Constitution of the United States?

4. Does Section 9 of Ch. 531 of the New York Session Laws, 1964, violate the due process clause of the Fifth and Fourteenth Amendments of the Constitution of the United States?



5. Does Section 9 of Ch. 531 of the New York Session Laws, 1964, violate the equal protection clause of the Fifth and Fourteenth Amendments of the Constitution of the United States?

6. Do certain parts of Section 7 of Ch. 531 also violate these constitutional guarantees?

Dated: New York, N. Y.

July 23, 1965

Lord, Day & Lord, Attorneys for Plaintiffs-Appellants, Joseph E. Seagram & Sons, Inc., et al,  
Office & P. O. Address, 25 Broadway, New York,  
N. Y. 10004.

To:

Louis J. Lefkowitz, Esq., Attorney General of the State  
of New York, Attorney for Defendants-Appellees.

County Clerk of Albany County, Albany, New York.

[fol. 370] Proof of Service (omitted in printing).

[fol. 371]

SUPREME COURT OF THE UNITED STATES

No. 545, October Term, 1965

JOSEPH E. SEAGRAM & SONS, INC., et al, Appellants,

v.

DONALD S. HOSTETTER, ETC., et al.

ORDER NOTING PROBABLE JURISDICTION—November 22, 1965

Appeal from the Court of Appeals of the State of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

FILE COPY

FILED

SEP 8 1965

JOHN F. DAVIS, CLERK

No. 545

Supreme Court of the United States

OCTOBER TERM, 1965

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*

*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,  
ROBERT E. DOYLE, constituting the State Liquor  
Authority, and LOUIS J. LEFKOWITZ, Attorney  
General of the State of New York,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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GERARD A. NAVAGH  
GENE R. McHAM  
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*Of Counsel*



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# Supreme Court of the United States

OCTOBER TERM, 1965

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No.

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*

*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER  
C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE,  
constituting the State Liquor Authority, and LOUIS J.  
LEFKOWITZ, Attorney General of the State of New York,  
*Appellees.*

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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## JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the Court of Appeals of the State of New York sustaining the validity of part of Section 7 and the entirety of Section 9 of Ch. 531, 1964 New York Session Laws, as these sections apply to appellants in this case.

## Citations of Opinions Below

The opinion of the Court of Appeals of the State of New York and the opinion of the three dissenting judges are included at pages 349-357 of the certified transcript of

record<sup>1</sup> and are set forth in Appendix A hereto. The opinion of the New York Supreme Court, Appellate Division, Third Department, is included at Tr. 167-170, and is set forth in Appendix B hereto. The opinion of the New York Supreme Court, Special Term, Albany County, is reported in 45 Misc. 2d 956, 258 N. Y. S. 2d 442 (1965). It is included at Tr. 6-19, and is set forth in Appendix C hereto.

### **Jurisdiction**

This action was commenced by a complaint of certain manufacturers and wholesalers of distilled spirits for declaratory and injunctive relief (Tr. 140-164) praying that appellees be permanently enjoined from enforcing part of Section 7 and the entirety of Section 9 of Chapter 531, 1964 New York Session Laws.<sup>2</sup> The complaint also asked that these sections be declared violative of the Constitution of the United States. The complaint claimed that these sections violate Article 1, Section 8 of the Constitution of the United States in that they lay a prohibitive burden upon interstate commerce conducted by appellants (Tr. 153). As these challenged sections also conflict with federal anti-trust statutes, it was charged that, they violate Section 6 of the Constitution of the United States, commonly referred to as the supremacy clause (Tr. 152). Section 9 of Ch. 531 would force appellants to charge prices in New York which are no higher than the lowest prices at which appellants or "related persons" who are not appellants in this action charge elsewhere in the United States. The complaint also asserted that Section 9 of Chapter 531, 1964 New York

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<sup>1</sup> Hereinafter references to the record in the court below are cited "Tr. ...."

<sup>2</sup> Section 9 of Chapter 531, 1964 New York Session Laws, is also hereinafter cited as "Section 9 of Ch. 531" and "Section 9."

Session Laws, violates Section 1 of the Fourteenth Amendment to the Constitution of the United States, in that forcing appellants to charge a price in New York no higher than that charged elsewhere in the nation (Tr. 149) denies them their property without due process of law.

The effect of Section 9 on liquor wholesalers is limited to certain "related person" New York wholesalers, whereas it allows competing wholesalers to price according to free market conditions. Section 9 does not affect the price of "private brand" liquors. The complaint also asserted that Section 9 denies appellants the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States (Tr. 153).

A Special Term of the New York Supreme Court denied the requested relief and granted appellees' cross motion for a declaration that the challenged sections of Chapter 531, 1964 New York Session Laws, are in all respects constitutional. The New York Supreme Court, Appellate Division, Third Department, affirmed the decision at Special Term. The Court of Appeals of the State of New York, over the dissent of three judges, affirmed the decision at Special Term.

The final order of remittitur of the Court of Appeals of the State of New York was dated and entered on July 9, 1965, and is set forth in Appendix D hereto. The notice of appeal was filed with the New York Supreme Court, Albany County, on July 23, 1965 (Tr. 360).

Appellants made an application to Chief Judge Charles Desmond for a stay of the challenged sections of Chapter 531 pending the determination of an appeal to this Court. A stay was granted until August 16, 1965, in order to allow appellants to apply for a stay before Mr. Justice Harlan,



the Circuit Justice for the Second Circuit. On August 5, 1965, Mr. Justice Harlan stayed enforcement of the challenged sections of Chapter 531 pending the determination of an appeal to this Court, on the condition that appellants file their Jurisdictional Statement by September 10, 1965.

Jurisdiction to hear the appeal is conferred on this Court by 28 U. S. C. § 1257 (2). The following cases sustain the jurisdiction of this Court:

*Carter v. Virginia*, 321 U. S. 131 (1944);

*Goldblatt v. Town of Hempstead*, 369 U. S. 590 (1962);

*Poulos v. New Hampshire*, 345 U. S. 395 (1953);

*Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945).

### Statutes Involved

For some time manufacturers and wholesalers of distilled spirits have been required to file a schedule of prices at which they will sell in New York during the immediately succeeding month with the State Liquor Authority. This practice, useful to the State in enforcing its previous policy of mandatory retail price maintenance in the distilled spirits industry—a state-enforced as opposed to the usual vendor-enforced “fair trade” act—is not challenged here.

However, Section 9 of Chapter 531, 1964 New York Session Laws, provides that all distillers and certain wholesalers selling in New York will file a duly verified affirmation with each price schedule attesting that the schedule lists prices that are no higher than the lowest charged by these distillers or by independent wholesalers elsewhere in the United States during the immediately preceding

month. Failure to file the affirmation will prevent both distillers and wholesalers from selling the brand in question for at least a month. Filing a false affirmation, even innocently, can result in license revocation, penal sentences and severe fines.

In order to understand the rationale of this maximum pricing legislation, it is necessary to examine Section 8 of Chapter 531, which states the legislative purpose underlying Section 9. The text of Chapter 531, 1964 New York Session Laws, with the challenged sections appropriately indicated, is set forth in Appendix E. A discussion of the effect of Section 9 is found *infra*, pp. 11-15.

Section 7 of Chapter 531, 1964 New York Session Laws, has added new conditions to the basic price filing requirements. Section 7 of Chapter 531 now prohibits a New York wholesaler from purchasing distilled spirits from a manufacturer unless that manufacturer has filed a schedule with the State Liquor Authority listing the prices at which the manufacturer sold to wholesalers "irrespective of the place of sale or delivery" of such liquor. Furthermore, the price schedules relating to distiller to wholesaler and wholesaler to retailer sales must now include "the net bottle and case price paid by the seller."

### Questions Presented

1. Does the Twenty-first Amendment to the Constitution of the United States permit the New York State Legislature to enact laws which levy their primary economic burden on the operations of the alcoholic beverage industry in other states and which were not enacted to regulate any social problems arising from the use of these beverages?

2. Does Section 9 of Ch. 531, in conflict with the terms and policies of the Sherman and Robinson-Patman Acts, violate Article 6 of the Constitution of the United States?

3. Does Section 9 of Ch. 531, by requiring appellants to price in New York in accordance with a standard based upon their lowest prices elsewhere in the nation, violate Article 1, Section 8 of the Constitution of the United States?

4. Does Section 9 of Ch. 531, having no relation to a legitimate police power aim, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

5. Does Section 9 of Ch. 531, which limits the maximum price New York "related person" wholesalers may charge for alcoholic beverages to the lowest price a wholesaler in any other state charged during the immediately preceding month while permitting other New York wholesalers to charge any price they choose, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

6. Do certain parts of Section 7 of Ch. 531 also violate these constitutional guarantees?

### **Statement**

Appellants shall describe the parties to this action and shall attempt to present a concise summary of relevant sections of the New York State Alcoholic Beverage Control Law (hereinafter cited as the "ABC Law") prior to passage of the challenged sections. Only by an examination of the philosophy underlying the entire ABC Law and the reasons for the passage of Section 9 of Chapter 531, 1964

New York Session Laws, can a true understanding of the impact of Section 9 be attained.

#### **A. The Parties.**

Appellants are distillers (manufacturers), wholesalers and importers of branded distilled spirits.

Appellant-distillers include the great majority of the producers of distilled liquor who sell to wholesalers and, in some cases, retailers in New York. These distillers sell their products, where permitted, throughout the United States and in many foreign countries. In addition certain distillers are United States importers and distributors for distilled spirits produced in foreign countries. Distillers who are qualified to do business in New York generally possess either a distiller's or a wholesaler's license as described in Sections 61 and 62 of the ABC Law. Those not qualified to do business in New York sell to duly licensed wholesalers, some of whom act as agents for distillers in filing distiller-to-wholesaler price schedules as required by Section 101-b-3(a) of the ABC Law. Those distillers possessing licenses generally file their own price schedules.

Appellant-wholesalers conduct a substantial part of the annual dollar volume of wholesale distilled spirits sales in New York. While the majority of these wholesalers are independent New York concerns, some others are nationwide parent companies which own outlets in New York and elsewhere that conduct wholesale liquor operations. Every appellant-wholesaler possesses a New York wholesaler's license.

Appellant-importers purchase distilled spirits from foreign manufacturers and sell to wholesalers and retailers under authority of New York wholesaler's licenses.

Appellees are Donald S. Hostetter *et al.*, Chairman, and members of the State Liquor Authority, the body charged with administering the ABC Law and empowered to revoke distillers' and wholesalers' licenses for violations thereof and the Attorney General of the State of New York, Louis J. Lefkowitz, whose office is authorized to prosecute criminal proceedings for violations of Section 101-b, as amended, of the ABC Law.

**B. The Law Concerning Liquor Prices Prior to Ch. 531.**

Section 101-b of the ABC Law was enacted in 1942 to promote temperance and to prevent undue stimulation of sales of alcoholic beverages arising from the granting of discounts, rebates, allowances, and free goods to "selected licensees" by certain manufacturers and wholesalers.

Generally, Section 101-b prohibits distillers and wholesalers from discriminating between like situated customers (1) in price, (2) in discounts for time of payment or (3) in quantity of merchandise. Thus, a distiller must offer the same base price and the same discounts to all those New York wholesalers to whom he sells. Similarly, New York wholesalers must offer the same base price and the same percentage discounts to all their retail customers.

Except for a maximum 2 per cent quantity discount and a 1 per cent discount for payment on or before 10 days from date of shipment, distillers and wholesalers of distilled spirits are prohibited from granting directly or indirectly "any discount, rebate, free goods, allowance or other inducement." ABC Law, Section 101-b-2(b).

To implement these restrictions, Section 101-b-3(a) requires a schedule to be filed monthly by the owner of a brand of liquor, or a wholesaler designated as agent by the

owner. The schedule is required to list the bottle and case price to wholesalers plus such information as the brand or trade name, capacity of package, nature of contents, and the age and proof where stated on the label.

A similar schedule of prices and general information is required to be filed by any manufacturer or wholesaler selling the brand in question to retailers.

Likewise, Section 101-c of the ABC Law was enacted in 1950 to promote temperance by eliminating price wars "which unduly stimulate the sale and consumption of liquor and wine. . . ." This section prohibited sales of liquor and wine at retail until the owner of a brand of liquor or wine, his designated wholesale agent, or any wholesaler approved by the State Liquor Authority filed a schedule with the Authority listing the minimum price at which the particular brand could be sold to the consumer. The mandatory resale price maintenance section was enforced by the State Liquor Authority, unlike the ordinary State "fair trade" law which is enforced by private action.

To these restrictions on the right to set one's prices in response to free market conditions, at the distiller and wholesaler levels, were grafted the provisions of Sections 7 and 9, Chapter 531, 1964 New York Session Laws, in April 1964.

#### **C. Events Preceding 1964 Legislation to Amend the Alcoholic Beverage Control Law.**

In his annual message to the Legislature on January 9, 1963, Governor Nelson A. Rockefeller announced the appointment of a Moreland Act Commission to undertake a study of the State Liquor Authority's administrative structure, practices and procedures. This Commission, com-

posed of distinguished citizens, made several studies and held a number of hearings in its efforts to become acquainted with the conduct of the alcoholic beverage industry in New York.

After taking voluminous testimony, the Moreland Act Commission concluded that Section 101-c was directly responsible for higher retail liquor prices in New York than in other states and tended to thwart that price competition which exists in a normal, vigorously competitive market. The recommendation of the Commission was to the point:

Section 101-c of the ABC Law, which provides for SLA enforcement of minimum consumer resale prices fixed by the distillers, should be repealed.

(Moreland Commission to Study the Alcoholic Beverage Control Law, Study Paper No. 3 (Tr. 275).)

The studies of the Commission call for a free competitive market in distilled spirits. At no time did the Commission advocate the maximum price controls embodied in the amendments to Section 101-b which are the subject of this action. The Commission called for the repeal of state enforced retail price maintenance because it felt this artificial price support was responsible for a higher retail liquor price in New York. It believed that after repeal of mandatory retail price maintenance the competition inherent in a free market could be counted upon to give a fair market price to New Yorkers. The Commission did not believe, contrary to the philosophy underlying old Section 101-c of the ABC Law, that artificially high retail liquor prices serve to promote temperance, the sole rationale for legislative regulation of liquor in New York.



#### D. The New Act.

In accordance with the recommendations of the Moreland Act Commission, Section 101-c of the ABC Law, the mandatory retail price maintenance section, was repealed by Section 11 of Ch. 531.

The rationale for the repeal of Section 101-c is contained in Section 8 of Ch. 531, which states that "fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor" in New York. Section 8 further states that New York consumers of alcoholic beverages should not be discriminated against by paying "unjustifiably higher" prices for brands of liquor than are "paid by consumers in other states." Section 8 maintains that "price discrimination and favoritism are contrary to the best interest and welfare of the people of this state." It continues by stating the belief that enactment of Section 11, repealing mandatory resale price maintenance, "will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state." Section 8 then goes on to assert the legislative conclusion that it is necessary to enact the maximum price provisions of Section 9 of Ch. 531, "in order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage."

Contrary to the belief of appellees and the majority opinion of the court below, the repeal of mandatory resale price maintenance is not challenged in this action.

Section 9 of Ch. 531 adds eight paragraphs to Section 101-b-3 of the ABC Law. These are paragraphs (d)-(k).

Paragraphs (d)-(g) of Section 9 place maximum price restrictions upon the sale of non-private label liquors in New York. Under paragraph (d) every basic schedule of prices to be charged wholesalers during the immediately succeeding month, required by Section 101-b-3(a), must now in effect list prices that are "no higher than the lowest price" given by the brand owner, a wholesaler designated as his agent or by a "related person" to any wholesaler elsewhere in the United States during the immediately preceding month. This is so because an affirmation verified by the party filing the basic schedule and stating that the prices in the schedule are no higher than the lowest charged elsewhere must accompany each such schedule. See ABC Law, Section 101-b-3(d) and (e). As noted, the price filed will be the price at which the item must be sold during the immediately succeeding month. Thus, for example, the lowest April price charged outside New York will be filed in the New York price schedule in May and will be the actual New York price in June.

The term "related person" is defined as any person in whose business the brand owner has a direct or indirect interest. It also means any person whose "exclusive, principal or substantial business" is the sale of a brand or brands of liquor "purchased from such brand owner or wholesaler designated as agent." A related person also includes one who has "an exclusive franchise or contract to sell such brand or brands." ABC Law, Section 101-b-3(d) and (f).

Pursuant to paragraph (f) a brand owner or wholesaler designated as agent by the brand owner must affirm that the prices listed in the basic schedule of prices to New York retailers filed by New York wholesalers are no

higher than the lowest price at which such item of liquor was sold by the brand owner, the wholesaler designated as his agent, or *any* "related person" doing business anywhere else in the nation to any retailer, exclusive of state retail agencies, elsewhere in the United States during the immediately preceding month.

Similarly, a wholesaler who is somehow determined to be a person "related" to a brand owner may not sell to New York retailers unless the brand owner or his agent affirms that the wholesaler's New York price schedule contains prices no higher than the lowest charged retailers elsewhere in the United States by the brand owner, his agents, or any person selling to retailers anywhere else in the nation who is "related" to the brand owner or his agents.

The definition of a "related person" in paragraph (f) is virtually the same as that in paragraph (d).

If a New York wholesaler is willing to attest that he is not a "related person", he may file a price schedule and affirmation containing a price of his own choosing, if his sales are confined to New York State only. However, should a non-related person wholesaler sell in any other state, he must affirm that his New York price is no higher than the price at which he sold in the other state. This freedom of price is granted by paragraph (g) and by amended Rule 16 of the State Liquor Authority.

Should an appropriate affirmation of a price no higher than the lowest granted elsewhere not be filed as required, paragraph (h) prohibits the sale of such item during the period covered by the price schedule in question.

Before a brand owner affirms that the price contained in a particular schedule is no higher than the lowest granted

elsewhere, he is required by paragraph (i) to make "appropriate reductions" for all "discounts in excess of those to be in effect under such schedule [the maximum 2 per cent quantity and 1 per cent time discount], and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer" purchasing the item elsewhere in the United States. Excluded from such "appropriate reductions" are differentials which reflect differences in state taxes and fees and "the actual cost of delivery." Paragraph (i) defines state taxes and fees as "excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon of liquor, and the term 'gallon' shall mean one hundred twenty-eight fluid ounces."

A person making a false statement in any affirmation filed pursuant to paragraphs (d)-(g) will be deemed guilty of a misdemeanor pursuant to paragraph (j) of Section 9. Upon conviction, the maximum penalty will be a fine of \$10,000 or imprisonment for a term of not more than 6 months or both. Pursuant to Section 7, paragraph 6 of Ch. 531, a company whose prices are improperly affirmed can lose its New York license and forfeit its bond.

By paragraph (k) a person convicted in accordance with paragraph (j) may not be able to affirm a price schedule for up to three months, at the discretion of the State Liquor Authority.

To summarize the significant changes in the amendments to Section 101-b-3 which are the subject of this action: (1) those selling to wholesalers and certain wholesalers selling to retailers cannot sell to their customers until the brand owner affirms that the price quoted for an item of

liquor (an item includes each separate bottle size of each brand) in the basic price schedule is no higher than the lowest price at which the item was sold elsewhere in the United States during the immediately preceding month by the brand owner or a person "related" to the brand owner; (2) these prices must reflect all allowances, discounts and other inducements given elsewhere to any wholesaler or retailer in the United States; (3) if the brand owner fails to file the affirmation, neither he nor the independent "related person" wholesalers of that brand may sell it in New York for the period of the price schedule—one month; (4) the new amendments are penal in nature, and one making any false statement in the affirmation is subject to prosecution for a misdemeanor and possible revocation of his license to sell in New York.

Section 101-c of the preexisting ABC Law is repealed and there is no longer any mandatory resale price maintenance covering liquor in New York. As with the basic price schedules of Section 101-b-2 and 3, the no higher than the lowest price provisions do not apply to brands of liquor that are owned exclusively by a single retailer.

#### **E. Appellants' Operational and Pricing Structure.**

Generally, distilled spirits are marketed under trade or brand names owned by the distiller, his designee or a foreign manufacturer, although some are marketed by wholesalers and retailers using their own "private labels."

The bulk of appellant-distillers' merchandise is marketed in the several states through independent wholesalers not having an exclusive franchise (Tr. 71). These wholesalers are under no legal compulsion to inform a distiller of the price at which they sell to retailers (Tr. 118, 122, 123).

Certain appellant-wholesalers conduct a nationwide wholesale business selling the brands of appellant-distillers and their own brands. However, the majority of appellant-wholesalers are independent New York merchants who conduct their operations only within the State of New York.

Due to varying regulations in each state affecting excise tax levels and conditions of sale, market limits in the distilled spirits industry are conterminous with state geographical boundaries (Tr. 111). Mississippi is the only completely dry state in the Union. Thus, there are at least fifty distinct market areas when the District of Columbia is included. However, within each market there exists a high degree of competition between different brands within the same generic type of liquor and, more broadly, between the generic types themselves (Tr. 111). An individual distiller may sell as many as 150 brands of various types of liquor within one market. These brands are sold in several different bottle sizes. Each brand may face a different competitive situation in each market. Seasonal variations in drinking habits and consumer demand affect, as in many other commodities, the net price which the product can command at any given time. Similarly, regional competition in the form of private labels and popular local brands have the result of temporarily affecting the price of a nationally known brand (Tr. 95).

New York sales account for some 12% of the national consumption of distilled spirits (Tr. 107).

Private label liquor sales account for 12% of the total sales of New York retailers carrying such brands. Yet the prices at which retailers purchase these labels are not required to be posted nor does the ABC Law impose maximum

price limitations upon these brands at any merchandising level.

In any determination of price, whether at the distiller or wholesaler levels, the element of cost is a primary consideration. Currently, Metropolitan New York wholesalers operate on one of the lowest levels of profit in the country. On the average they realize less than one per cent net profit on their net sales before taxes (Tr. 113). This is largely because their net operating expenses average 10.88% of net sales (Tr. 113). In 1963 upstate New York wholesalers averaged a net profit of .66% on their net sales before taxes. Their operating expenses averaged 11.5% of net sales (Tr. 113). These expense figures are among the highest in the nation. The national figures for firms of comparable sales volume are: operating expenses 9.87% of net sales and before-tax profits 1.42% (Tr. 113). This profit figure is roughly double that of reporting New York firms. As an example of contrast, Florida wholesalers in 1963 had operating expenses of only 7.34% of net sales and profits of 1.52%. Other large metropolitan centers such as St. Louis and Chicago had figures better than the national average (Tr. 113). The maximum price provisions in the 1964 amendments to Section 101-b do not make allowance for these differences in the cost of doing business.

Nor have distillers realized an excessively high rate of profit at the expense of New York consumers. The actual facts reflect a different situation. Of the 65 industries analyzed in 1963 by the First National City Bank, the distilling industry ranked 53rd in percent of return on investment, behind such others as automobiles, soft drinks, drugs and medicines (Tr. 110).



### F. Opinions Below.

Four judges of the Court of Appeals of the State of New York voted to affirm the judgment of the Supreme Court, Special Term, which was affirmed by the Supreme Court, Appellate Division, Third Department, holding that the Twenty-first Amendment to the Constitution of the United States shielded the challenged sections of Chapter 531 from an attack based upon violations of other sections of the federal constitution. To the majority of the Court of Appeals, the ability of the State to prohibit entirely the traffic in liquor *ipso facto* allows the legislature, once it decides to permit the sale of distilled spirits, to regulate the industry in any manner it sees fit, without regard to federal constitutional guarantees.

The majority found that even though the effect of Section 9 of Ch. 531 is to force appellants to tie their prices in New York to those prevailing in other states, there is no resulting interference with interstate commerce (Tr. 352). The majority went on to say that if the effect of Section 9 of Chapter 531 "on New York is too low a price they have it within their power to raise the lowest price elsewhere" (Tr. 352). The majority cited opinions of this Court rendered shortly after ratification of the Twenty-first Amendment to the Constitution of the United States, for the proposition that the commerce clause, Article 1, Section 8 of the Constitution of the United States, is no longer applicable to the distilled spirits industry.

Nor did the majority of the Court of Appeals feel that Section 9 of Chapter 531, 1964 New York Session Laws, violates the supremacy clause of the federal constitution, Article VI, because of conflict with the federal Sherman and Robinson-Patman Acts.

Three judges of the Court of Appeals stated that while a state is indeed empowered to prohibit the sale of distilled spirits entirely, if it chooses to allow the industry to operate it must do so in a constitutional manner. The dissenting judges chose to set forth at length the reasons why Section 9 of Chapter 531 is not a valid function of the State's police power. However, in his opinion Chief Judge Desmond emphasized that he was not overlooking "a number of other troublesome aspects of these amendments", even though the dissenting opinion failed to discuss them at length (Tr. 357).

The decision of the majority of the Court of Appeals betrays these fundamental faults:

1. It assumes that the Twenty-first Amendment to the federal constitution has rendered the commerce clause a dead-letter in the area of alcoholic beverages and permits the states to control the alcoholic beverage industry in a way which has a real and marked effect on the conduct of the industry in other states.

2. While not willing to state that the Twenty-first Amendment to the federal constitution can sustain a state act in conflict with a federal act and thus violate Article VI of the Constitution, the majority opinion failed to recognize the sharp conflict of Section 9 of Chapter 531 with federal antitrust acts.

3. In reasoning from the premise that the power to prohibit intoxicating liquor includes the power to regulate arbitrarily if sale is permitted, the majority of the Court of Appeals fell into a logical fallacy which prevented it from realizing that the state has a legal obligation, once it

permits alcoholic beverages to be sold within the state, to regulate traffic in this commodity in accordance with constitutional standards.

### **The Questions Presented are Substantial**

#### **POINT I**

**The Twenty-first Amendment to the Constitution of the United States does not validate a New York statute which levies its major economic burden on the operations of the distilled spirits industry in other states and which does not promote temperance or check evils peculiar to the trade in alcoholic beverages in New York.**

Section 2 of the Twenty-first Amendment to the Constitution of the United States proclaims:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. Ratified December 5, 1933.

A major case dealing with the Twenty-first Amendment realized that the Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries." *United States v. Frankfort Distilleries*, 324 U. S. 293, 299 (1945).

The opinion below of the Court of Appeals concluded that, regardless of whether Section 9 of Ch. 531 violates the commerce clause, it is protected by the Twenty-first Amendment to the federal constitution because Section 9 does not affect appellants' operations outside New York.

An examination of some of the undeniable effects of Section 9 on appellants' operations in other states and on the administration of alcoholic beverage control laws in these states will illustrate the error of the court below.

The uncontroverted facts in this case show that the cost of doing business in New York for distillers and wholesalers is among the highest in the country. See p. 17, *supra*. The sale of alcoholic beverages in New York accounts for approximately 12% of the nation's total. See p. 16, *supra*.

If all prices in New York State were limited to the lowest price charged in any single sale in the low-cost states—as mandated by the statute—many New York wholesalers would be forced out of business unless distillers could somehow force “related person” wholesalers in other states to charge their customers artificially high prices. Similarly, distillers will have to ignore lower selling expenses in other states and sell at artificially high prices in other states or else sell at a loss in New York.

Thus one of the actual major economic effects of the New York statute may well be the imposition of artificially higher prices in other states at rates which will enable each of the distillers and wholesalers to continue to do business in New York State. This fact was recognized by the entirety of the Court of Appeals (Tr. 352, 357). This probable effect on business and commerce in other states is not merely incidental to a valid regulation of prices for sales within New York State—it is a major economic effect of the legislation.

Similarly, a producer, nationwide wholesaler or importer of branded distilled spirits selling in the largest market in the nation will not be free to determine his price

in response to competitive situations in other markets without determining the effect that such price will have on his New York market. Contracts of sale in other states will be negotiated with concern as to their effect on the New York price structure. One will certainly be loath to grant temporarily a promotional discount on 100 cases of his product in, say, Arizona to meet a local competitive condition if he will be required to grant the same discount on the sale of 10,000 cases in New York.

Likewise, distillers wishing to sell to New York "related person" wholesalers must affirm that the price at which these wholesalers sell to New York retailers is no higher than the lowest price at which "related person" wholesalers in other states sold to retailers elsewhere in the United States during the immediately preceding month. To make this affirmation distillers will have to secure price information from related person wholesalers in other states and insist upon the filing of the lowest of these prices by New York wholesalers who come within the "related person" definition. Section 9 forces the distiller to run the risk of a Sherman Act prosecution by collecting and disseminating this information and acting as a conduit for what amounts to a price agreement between certain New York wholesalers and the wholesaler who sells the particular brand at the lowest price elsewhere in the United States during a particular month. *Cf. American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921). It can also be said that the distiller, by refusing to affirm the price schedule of a New York wholesaler who lists prices higher than the lowest collected by the distillers from wholesalers around the country, is engaging in conduct prohibited by the Sherman Act. See pp. 38-39, *infra*.

Of course this collection of the price information required by Section 9 which may lead to a Sherman Act prosecution will be conducted outside of New York and thus transcend the limits of the Twenty-first Amendment set forth in *Frankfort Distilleries, supra*. Assuming arguendo that the state is permitted by the Twenty-first Amendment to burden interstate commerce virtually as it pleases *within the boundaries of the state*, *Frankfort* makes it clear that the Twenty-first Amendment will not allow a state to pass liquor legislation which has the real effect of requiring a distiller to violate the basic federal antitrust laws *in another state* if he is to comply with the state act. When a state does so "it demands private conduct which the Sherman Act forbids." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 389 (1951).

So, too, Section 9 will impose upon other state liquor legislation. For example California allows wholesalers to grant a maximum 8% discount for quantity purchases but, like many other states, places no restrictions on discounts offered by distillers. See Chapter 1, Title 4, California Administrative Code, Rule 100(1). New York only allows a 2% liquor quantity discount, but by the terms of Section 101-b-3(i), any discount in excess of 2% accorded elsewhere must be given to New York purchasers. Will distillers be willing to grant California purchasers discounts in excess of 2% if this will affect their New York prices? Will not Section 101-b-3(i) have the practical effect of negating the California Act? A seller in California must now weigh any decision to grant a discount in excess of 2% by the effect this will have on his profits in New York as well as California.

Thus, from what has been said above, it is evident that the primary economic impact of Section 9 will be directed towards industry operations without the borders of New York. Only when pricing policies and reporting procedures are established in other states will Section 9 have any effect on operations in New York. New York will not experience the economic impact of this section on prices until some two months after the prices are charged in other states. The federal constitution does not allow one state to interfere with commerce in and among the other states in this manner.

It is true that early decisions of this Court cited by the majority below appeared to state that the commerce clause in particular and perhaps other sections of the federal constitution in general are virtual dead letters when alcoholic beverage regulation is at issue. These cases generally allowed discriminatory charges and other burdens to be imposed upon imported alcoholic beverages and also allowed one state to place these burdens on the alcoholic beverages imported from a second state while allowing these beverages to be imported without discriminatory treatment when introduced from a third state. See, e.g., *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U. S. 391 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59 (1936).

However, none of the statutes at issue in these cases required a prior act in another state by industry members as a condition of compliance with the challenged legislation. None of the statutes were claimed to have had the slightest



price or marketing impact in other states. And not one of these states seized upon its economic power to force businesses operating in interstate commerce to price at a level having no regard for the economics of the market in the legislating state. The statutes in these cases were concerned mainly with protecting a local industry through the imposition of obstacles on out of state producers. Whether this was a goal that should have been protected by the Twenty-first Amendment is obviously not the question here. But it is clear that the cases acceding to this protection of home-grown industry cannot stand as authority when a state demands unjustifiably lower prices, even though the result, admittedly, may be higher prices in other states.

This Court has failed to endorse its earlier general statements regarding the breadth of the Twenty-first Amendment. In 1945 the Court emphasized that federal control over the interstate aspects of the alcoholic beverage industry has not been entirely delegated to the states by the Twenty-first Amendment as the early cases imply. *United States v. Frankfort Distilleries*, 324 U. S. 293 (1945).

Commentary following the *Frankfort* decision approved this restrictive view of the scope of the Twenty-first Amendment, a note in the Yale Law Journal stating:

The language of Section Two does not purport to grant to the states a plenary power unrestricted by pre-existing constitutional limitations. True, it prohibits the transportation and importation of liquors into a state in violation of "the laws thereof," but it would not require boldness beyond the capacity of the Supreme Court to interpolate the word "proper" to modify "laws." This interpolation is supported by the canon that a construction which raises a conflict

between parts of a constitution is inadmissible when, by reasonable interpretation, the parts may be made to harmonize. In other cases the Courts have freely implied similar limitations to seemingly all-embracing language in order to effectuate the purpose of an amendment. Note, *The Twenty-First Amendment Versus the Interstate Commerce Clause*, 55 Yale L. J. 815, 816 (1946).

In the past term this Court has struck down state legislation which attempted to overreach state borders in regulating alcoholic beverages. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964), the State of New York attempted to exert jurisdiction over a corporation engaged in the business of selling liquors to departing airline travelers. In attempting to justify its act, the State Liquor Authority asserted that the commerce clause does not apply to the state regulation of liquor. In support of this claim, the Authority relied upon the line of cases cited at p. 24, *supra*.

This Court remained faithful to its decision in *Frankfort* and rejected this view. The opinion of Mr. Justice Stewart countered the assertion that the commerce clause had been repealed by the Twenty-first Amendment by calling this view "an absurd oversimplification." 377 U. S. at 332. Mr. Justice Stewart stated:

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." 377 U. S. at 332.

The majority opinion of the Court of Appeals of the State of New York found that not only does the Twenty-

first Amendment eliminate any commerce clause considerations, but that it also cannot be used to protect state legislation in direct conflict with federal statutes (Tr. 354). While the majority's interpretation of the relationship between the Twenty-first Amendment and the commerce clause violates the balancing test of *Idlewild*, its view that the Twenty-first Amendment can serve to allow state liquor legislation in direct conflict with federal statutes is even more in conflict with decisions of this Court.

Shortly after rendering the *Frankfort* decision, this Court made the following observation in *Nippert v. City of Richmond*, 327 U. S. 416, 425 n. 15 (1946):

"Thus, even the commerce in intoxicating liquor, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, *at any rate when the State's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic . . .*" (Emphasis added.)

Of course the Sherman and Robinson-Patman Acts are examples of this type of congressional legislation. See pp. 31-39, *infra*.

In a companion case to *Idlewild*, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U. S. 341 (1964), this Court held that where a state enactment affecting intoxicating liquors is contrary to an explicit command of the Constitution—in that case Article I, Section 10, the export-import clause—the Twenty-first Amendment will not save the state statute. Mr. Justice Stewart, again writing for the majority, averred:

. . . What is involved in the present case, however, is not the generalized authority given to Congress by

the Commerce Clause, but a constitutional provision which flatly prohibits any State from imposing a tax upon imports from abroad . . .

This Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids . . . 377 U. S. at 344-46.

*Beam* also serves as a warning that the Twenty-first Amendment will not protect the attempt of Section 9 to require foreign producers to make their prices in other states of the country a basis for their New York prices. Because the terms under which import trade may be conducted necessarily involves foreign relations, any such restrictions can only be imposed by Congress or the federal executive.

If the decisions in *Idlewild*, *Beam*, *Nippert* and *Frankfort* are compromised, not only will state antitrust legislation in conflict with federal enactments be encouraged but the way will be clear for states to pass with impunity any legislation directed towards the alcoholic beverage industry in conflict with *any* federal act, notwithstanding how remote the state legislation may be from the protection of the public from the alleged social evils of liquor. The most demagogic type of state legislation could ensue. See generally Comment, 25 Calif. L. Rev. 718, 728 (1936).

Such a possible chamber of horrors has not escaped judicial concern, for the Sixth Circuit rejected a claim of state absolutism in the realm of liquor legislation based upon the Twenty-first Amendment when it observed:

Followed to its logical conclusion, the appellant's construction, if valid, would mean that the federal

government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages under the authority of the so-called Car Seal Act, *nor to regulate or prohibit unfair trade practices in respect to such commodities through the Federal Trade Commission*, nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under the authority of the National Labor Relations Act, 29 U. S. C. A. § 151 et seq., nor to prescribe minimum wages or maximum hours for employees in such enterprises under the authority of the Fair Labor Standards Act, 29 U. S. C. A. § 201 et seq. These implications demonstrate the tenuousness of the appellant's broad contentions. *Jatros v. Bowles*, 143 F. 2d 453, 455 (6th Cir. 1944). (Emphasis added.)

The foregoing discussion readily demonstrates the substantiality of the federal question involved concerning the scope of the Twenty-first Amendment. Unlike its posture in early cases concerning this Amendment, the Court is now aware that there are real limits upon state power to legislate freely in the realm of alcoholic beverages. As succeeding sections of this Statement will illustrate, this maximum price legislation raises real and substantial federal questions involving violations of the supremacy and commerce clauses of the federal constitution. It is submitted that this Court should assume jurisdiction of this case in order to ascertain whether these real constitutional violations can be neutralized by the Twenty-first Amendment.

## POINT II

**The provisions of Section 9 requiring distillers and wholesalers to offer New York purchasers a price no higher than the lowest price charged elsewhere violate the policy and terms of federal antitrust acts and are thus in conflict with the supremacy clause of the Constitution of the United States.**

Section 8 of New York Session Laws, 1964, Ch. 531, states that Section 101-c of the ABC Law, providing for mandatory resale price maintenance of branded distilled spirits, is being repealed because it has resulted in price discrimination and disadvantage to New York consumers. This discrimination, the Legislature declares, has taken the form of unjustifiably higher prices being charged to New Yorkers, in comparison with prices charged consumers in other states. However, Section 8 continues by implying that manufacturers and wholesalers of branded distilled spirits might attempt to frustrate the elimination of price discrimination and disadvantage declared to be the result of mandatory resale price maintenance by engaging in "monopolistic and anti-competitive practices" once Section 101-c of the ABC Law is repealed. It thus becomes a matter of "legislative determination" that the no higher than the lowest price provisions contained in Section 9 are needed to prevent manufacturers, distributors and importers of branded distilled spirits from frustrating the policy of encouraging "fundamental principles of price competition" inherent in the revocation of mandatory resale price maintenance.

Stripped of its ambiguous verbiage Section 8 states that state-enforced resale price maintenance has produced unjustifiably higher consumer prices which may continue in

spite of the repeal of Section 101-c, and it is only through special anti-price discrimination and anti-monopoly legislation, directed only at certain segments of the branded distilled spirits industry, that the possible continuance of this presumed inequitable situation may be avoided. The Legislature impliedly believes that unregulated pricing policies at the distiller and wholesaler levels will not produce free and untrammelled competition. It should be noted that, while the Legislature struck down state-enforced resale price maintenance, it did not prevent the industry from fixing consumer prices by resorting to the Feld-Crawford Act, N. Y. Gen. Bus. Law, § 369-a. The Feld-Crawford Act is the general New York fair trade statute.

Keeping in mind that the legislative purpose is to "forestall possible monopolistic and anti-competitive practices" which would, if not controlled, lead unjustifiably to higher prices for New York consumers, a comparison of this state antitrust legislation with federal acts on the same subject will demonstrate the serious federal constitutional question involved.

By juxtaposing the Robinson-Patman Act, 15 U. S. C., §§ 13(a)-(f), 21(a) (1959), it becomes apparent that the New York act, designed to thwart potential price discrimination, is in direct conflict on several counts with this federal statute having the same purpose.

In enacting the maximum price provisions of Section 9 of Ch. 531, the New York Legislature has failed to make allowance for different market and competitive situations in different areas of the country or for variations in the cost of doing business in different states, aside from actual delivery and state excise gallonage tax expenses. Exemplary of



this is the fact that all allowances, rebates, or other inducements given in other markets which contribute to the lowest net price at which a brand of liquor is sold elsewhere in the United States are required to be accorded to New York buyers, regardless of whether giving these promotional allowances to buyers in other states in fact affects the competitive position of New York sellers or purchasers. This is in clear contrast with Section 2(a) of the Robinson-Patman Act, which makes it illegal for a seller to discriminate in price between different purchasers of commodities of like grade and quality only "where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce . . ."

The New York rule, however, is absolute. It makes no difference if price differentials in various states in no way tend to lessen competition or create a monopoly between buyers or sellers in New York or destroys or prevents competition in any other state. The Robinson-Patman Act does not condemn mere geographical price differentials absent a showing of lessened competition between the sellers or buyers as a result of the differential. See *F. T. C. v. Anheuser-Busch, Inc.*, 363 U. S. 536 (1960); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9 (S.D.N.Y. 1955); *In the Matter of General Foods Corp.* (I), 50 F.T.C. 885 (1954). Thus, what is permitted by the Robinson-Patman Act is prohibited by Section 9 of Ch. 531.

Moreover, Section 2(a) of the Robinson-Patman Act does not render illegal price differentials which merely reflect differences in the cost of sale resulting from differing quantities "in which such commodities are to such purchasers sold or delivered."

Section 101-b-2(b) of the ABC Law, it will be remembered, places a maximum quantity discount of 2% on sales of liquor to New York customers. If a larger quantity discount is offered to customers in other states and such discount results in the lowest price offered in the United States, that part of the discount which exceeds 2% must be granted to New York customers, regardless of the actual amount of goods ordered by the New York customer and without regard to whether such discount can be "cost justified" under the Robinson-Patman Act. See ABC Law, Section 101-b-3(i). Thus, under the terms of the Robinson-Patman Act a quantity discount may be offered only when "cost justified", but if such a legitimate differential were a factor in the lowest price charged elsewhere in the United States, one cannot sell branded distilled spirits in New York unless the same discount is granted New York customers where it may be unjustified and hence discriminatory against one's competitors selling in New York State. Cf. *F. T. C. v. Anheuser-Busch, Inc.*, 363 U. S. 536 (1960). What is required under Section 9 of Ch. 531 is prohibited by the Robinson-Patman Act.

Section 2(b) of the Robinson-Patman Act allows the seller to differentiate in price between his customers if the seller can demonstrate that the price differential is "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

This Court has specifically ruled that the purpose of this provision is to abet what is inherent in our competitive system, i.e., to allow a seller to defend himself by meeting his competitor's price. See *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 248-49 (1951).

The New York law grants no such exemption for price differentials between customers in New York and other states. Should a manufacturer or wholesaler of branded distilled spirits reduce his price in another state to meet competition from another manufacturer or wholesaler, who may or may not sell in New York, with the result that the net price becomes the lowest quoted anywhere in the United States for the particular brand, that brand of liquor cannot be sold in New York unless the same price is quoted to the appropriate New York purchasers. The seller of a brand will be compelled to grant an unearned discount in New York or be in violation of Section 9, even though the Robinson-Patman Act realizes the value to competition inherent in such price differentials. Section 9 of Ch. 531 would perforce have the effect of eliminating price as an aspect of meeting competition in these markets.

Moreover, while manufacturers at least have the choice of whether to engage in such price competition, New York wholesalers do not. If a wholesaler in another state lowers his price to retailers to meet local competition and that price becomes the lowest at which such brand is being sold at wholesale elsewhere in the United States, New York wholesalers who are somehow determined to be "related persons", without regard to differentials in the cost of doing business, profit margins or competitive pressures, must give that same price to New York retailers or else breach Section 9 of Ch. 531.

Sections 2(d) and (e) of the Robinson-Patman Act, taken together, prevent a seller from either paying a buyer for promotional services furnished the seller by the buyer or from granting or furnishing such services to the buyer unless the seller accords other *competing buyers* the same

services on proportionately equal terms. If the purchasers are not in competition with one another, then the seller may grant disproportionate services and/or allowances. See Austin, *Price Discrimination*, 117 (1950).

However, the no higher than the lowest price amendments of Section 9 require a manufacturer or wholesaler of branded distilled spirits, who grants allowances, rebates or other "inducements of any kind whatsoever" to buyers in other states, to provide the same discounts to New York customers if these discounts have the effect of making the total net price the lowest quoted anywhere in the United States. Requiring a seller to give his New York customers the same promotional discounts given customers not in competition with New York purchasers is yet another example of how the new amendments to Section 101-b compel distillers and wholesalers of branded distilled spirits to price their goods in a manner not mandated by the Robinson-Patman Act.

In pertinent part Article VI of the Constitution of the United States, commonly called the supremacy clause, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

Thus, the conflict is clear, for in terms used by the Court of Appeals of the State of New York in *Quaker Oats Co. v. City of New York*, 295 N. Y. 527 (1946), New York has attempted to forbid "what the Government has authorized" or to permit what the Congress has prohibited. 295 N. Y. at 536.

A state act is invalid if it conflicts with either the language or the policy of a federal act even assuming the act to be otherwise in furtherance of the State's police power, which is not the case here. *Franklin Nat'l Bank v. New York*, 347 U. S. 373 (1954); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945). As has been seen, the no higher than the lowest price provisions of Section 9 of Ch. 531 specifically requires private action prohibited by the Robinson-Patman Act and objects to private action permitted by the Robinson-Patman Act.

But the provisions of Section 9 go further; they also contravene the policy embodied in the Sherman Act, 15 U. S. C., §§ 1-7 (1959).

Section 1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal. . . .

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor. . . .

Mr. Justice Black summarized the rationale underlying the Sherman Act when he said

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, *the lowest prices*, the highest quality and the greatest material progress, *while at the same time providing an environment conducive to the preservation of our democratic, political*

and social institutions. *Northern Pacific Railway Co. v. United States*, 356 U. S. 1, 4 (1958). (Emphasis added.)

The New York Legislature subverts this federal doctrine of competition based upon free market demands as well as its own stated desire for the return of "fundamental principles of price competition" in the liquor industry, for it commands producers, wholesalers and importers of distilled spirits to grant New York purchasers a price as low as that granted elsewhere regardless of differing competitive factors which may enter into the determination of that lowest price in another state. The Sherman Act does not make price differentials illegal, nor does it necessarily regard parallel prices among competitors as a violation of economic liberty. See *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U. S. 537, 541 (1954); *United States v. International Harvester Co.*, 274 U. S. 693, 708-09 (1927); *United States v. United States Steel Corp.*, 251 U. S. 417, 447-50 (1920).

Again, as with the Robinson-Patman Act, the New York provisions regarding maximum liquor pricing are in conflict with the basic elements of federal antitrust policy. The Sherman Act, "a charter of economic liberty" which assumes that government should not interfere with the free market until certain deleterious acts are definitely perceived, is subverted by the amendments to Section 101-b of the ABC Law, which establish a charter of economic restraint rather than economic freedom. A seller of branded distilled spirits in other markets, facing differing competitive situations including varying costs of doing business, must judge his pricing policy in light of the effect it will have upon his New York price. The Sherman Act is a doctrine embracing the traditional American free enterprise

concept of unrestrained and vigorous competition, while the New York act is an attempt to coerce purveyors of branded distilled spirits into granting New York retailers a price which may have no relation to the actual competitive situation in New York. That such a policy is antithetical to the rationale of the Sherman Act can hardly be questioned.

As noted earlier, see p. 22, *supra*, the real effect of Section 9 will be to force distiller-brand owners to act as a clearing house of price information between "related person" wholesalers in New York and elsewhere in the country, thus exposing these distillers to Sherman Act prosecution.

Under these same circumstances, it is clear that the New York wholesaler, having no knowledge of wholesale prices elsewhere in the United States, will be required by the brand owner-distiller to file a price in his monthly schedule which the brand owner can affirm is the lowest given elsewhere. This can be accomplished with even a minimum degree of certainty only if the wholesaler submits his proposed price schedule to the distiller in advance of filing with the State Liquor Authority. The distiller, with what knowledge he has been able to glean concerning the lowest wholesale prices elsewhere in the United States, must insist that the New York wholesaler amend his proposed price if the distiller has knowledge that a wholesaler elsewhere in the country made even one sale of the brand in question at a lower price during the immediately preceding month. The New York wholesaler will thus be able to know at what price he will sell to retailers during the next month only after receiving the approval of the brand owner, who must in effect inform the wholesaler at what price to sell, using as a guide the lowest wholesale price anywhere else in the nation.



There can be little doubt that such activity, not directly ordered and specifically protected by the terms of Section 9, can avoid giving rise to a Sherman Act violation. Compare *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960), with *United States v. Colgate & Co.*, 250 U. S. 300 (1919). See *F. T. C. v. Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951).

The cases discussed above illustrate an inescapable conclusion: a state statute, no matter if enacted in furtherance of a valid police power objective as is not the case here, is invalid if its terms are in conflict with the language or policy of a federal enactment. The conclusion is inescapable because the command of the supremacy clause is absolute. Federal laws are the supreme law of the land, and no contrary state enactment can challenge federal supremacy. Unlike other areas of constitutional law, the supremacy clause brooks no balancing test, no weighing of conflicting policies. Should this Court find the sections of Ch. 531 under examination in this action in conflict with federal law, it is constitutionally bound by Article VI to assert its jurisdiction and repudiate the offending state provisions.

### POINT III

**Section 9 of Chapter 531, 1964 New York Session Laws, places an undue and illegal burden on interstate commerce.**

The commerce clause of the Constitution of the United States, Article I, Section 8, Clause 3 reads as follows: "The Congress shall have power . . . To regulate Commerce with foreign Nations and among the several States . . ."

The majority of the New York State Court of Appeals flatly stated that Section 9 of Ch. 531 does not interfere with interstate commerce (Tr. 352). "'Commerce is interstate' . . . when it 'concerns more States than one'." *United States v. South-Eastern Underwriters*, 322 U. S. 533, 551 (1944) (quoting Marshall, C. J., in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824)). If Section 9 were in force, no appellant would make any contract of sale in any other state without carefully weighing the effect on his New York price schedules in the immediately ensuing month. Every transaction in every other state will be subject to interference by this act of the New York Legislature. This fact was implicitly underscored by the entirety of the court below, which recognized that higher prices in other states may well be the result of the enforcement of Section 9 (Tr. 352, 357).

If they do not accede to the commandment of Section 9 of Ch. 531, appellants can be prohibited from doing business in New York, which accounts for 12% of the total national sales of distilled spirits. Also, any appellants filing a false affirmation face criminal penalties and loss of their licenses—even if the affirmation is innocently in error. See ABC Law, Section 101-b-3(j). In effect the New York Legislature has ordered appellants to price their goods at a level sufficient to ensure that New York retailers and consumers will receive a price as low as is granted anywhere else in the United States regardless of competitive or cost variations. It is submitted that this legislation is an attempt to exact economic advantage in favor of New York purchasers in exchange for the right to sell goods in the largest market in the nation. As such it is patently illegal under the commerce clause. *Baldwin v. G. A. F.*

*Seelig, Inc.*, 294 U. S. 511 (1935); *Hood & Sons, Inc. v. DuMond*, 336 U. S. 525, 535 (1949) ("*Baldwin v. Seelig*, ... is an explicit ... and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone."); see Dowling, *Interstate Commerce and State Power—Revised Version*, 47 Colum. L. Rev. 547, 550 (1947).

The line of decision beginning with *Seelig* was reaffirmed recently by *Polar Ice Cream and Creamery Corp. v. Andrews*, 375 U. S. 361 (1964).

*Seelig* and its successors have, of course, been severely violated by the no higher than the lowest price provisions of Section 9 of Ch. 531, 1964 New York Session Laws. From an assumption, unsubstantiated by the State and unacknowledged by appellants, that New York consumers have been paying *unjustifiably* higher prices during the reign of State-imposed mandatory resale price maintenance over the retail price of branded distilled spirits, the Legislature then proceeds to demand that New York purchasers receive not necessarily fair prices but the lowest prices. No consideration or determination is made whether the lowest price elsewhere in the United States is a fair price for New York buyers. Yet, distillers and "related person" wholesalers of branded distilled spirits may not sell in the largest market in the United States, accounting for some 12% of retail branded distilled spirit sales, unless they pay tribute exacted by the New York Legislature in the form of the lowest price granted elsewhere in any other locality in the United States, regardless of competitive or market demands or cost of operations. This statutory attempt to secure economic advantage by prohibiting sales to customers in New York unless the lowest price quoted else-

where is given in New York is an unquestioned violation of the *Seelig* line of cases.

Of course if New York can demand that branded distilled spirits be sold within the State at the lowest possible price there is nothing to prevent other states from making the same requirements before allowing branded distilled spirits to be sold. That a morass of conflicting legislation regarding the subject of lowest prices could result is readily discernible. New York, pursuant to Section 101-b-3 of the ABC Law, requires distillers and wholesalers of branded distilled spirits to file a schedule of prices by the first and the 10th of the month respectively, these prices to be effective in New York during the next succeeding month. For example, the lowest price granted in any other state in the United States in February would be filed in the March schedule of New York prices and would be the price at which the brand is sold in New York in April.

Other states could pass statutes requiring manufacturers and wholesalers of branded distilled spirits to grant the lowest price being given in any other state precisely at the time of sale within the legislating state. Or a state could adopt a statute such as has been declared unconstitutional in an unreported Kansas decision, see *Laird & Co. v. Gage*, Third Judicial District, D.C. No. 898461 (May 7, 1964), and demand that the lowest price given elsewhere in the United States be given in the legislating state for a definite period of time, in the case of Kansas 3 months. It can be seen that the possibilities and combinations are virtually limitless. It is also apparent that manufacturers and wholesalers of branded distilled spirits, because of conflicting requirements as to when the lowest price is to be determined, could be put in the position of being unable to comply with one act because of the mere fact they were

attempting to comply with another. Also, the danger arises that the price for distilled spirits might become frozen at a particular level; if a distiller, nationwide wholesaler or importer attempted to raise their prices in any particular state they would more than likely be risking violation of another state's no higher than lowest price statute because of the latter state's legislation being based upon conflicting time sequences.

That the Constitution of the United States does not permit such a morass of conflicting and onerous legislation to burden interstate commerce is clear. It is because of this possibility that this Court has laid down the doctrine that the Constitution does not permit a state legislature to control the conduct of those engaged in interstate commerce beyond the boundaries of the legislating state. See, *e.g.*, *Bosemon v. Connecticut General Life Ins. Co.*, 301 U. S. 196 (1937); *Hartford Accident & Indem. Co. v. Delta & Pineland Co.*, 292 U. S. 143 (1934). The New York statute has that effect. See pp. 21-23, *supra*.

This is not a case where the state has legislated in order to promote temperance, the sole rationale of the New York ABC Law, see p. 46, *infra*. Nor is it one where the state has reasonably requested the distilled spirits industry to contribute its just share of revenue to the state. Rather, this statute is solely an unreasonable, unjustified attempt by a state in which 12% of the national trade in distilled spirits is conducted to use its economic power to coerce distillers, wholesalers and importers into accommodating the state with prices which bear little relation to those that would obtain if New York market conditions were the determinant. But New York market conditions are ignored while New York prices are based upon the costs, profits, labor conditions, taste preferences and governmental regu-

lations which prevail in other states. It is submitted that it is precisely this type of legislation—grievously burdensome on commerce in other states without being of any value in protecting the public from the social problems connected with alcoholic beverage traffic—which must fall under the test established only last Term in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964).

#### POINT IV

**The provisions of the new act requiring distillers and wholesalers to offer New York purchasers a price no higher than the lowest price given elsewhere are not justified under the state's police power and are hence a violation of due process of law guaranteed by the Constitution of the United States.**

##### **A. Section 9 is not in Furtherance of a Valid Police Power Objective.**

The Fourteenth Amendment to the Constitution of the United States prohibits the several states from depriving any person "of life, liberty, or property, without due process of law."

It is well recognized that the constitutional prohibition against deprivation of one's property without due process of law is absolute unless property interests are affected as a result of a valid exercise of the state's inherent police power. The police power gives the state the right to impair the free enjoyment of one's property only if necessary to provide for the health, safety and general welfare of the people.

While the legislative right to pass enactments designed to advance the health, safety and welfare of the people is necessarily a broad power, it is not without limitation, for

the Fourteenth Amendment to the federal constitution stands as a guardian of individual rights when state legislation affecting these rights does not comport with police power standards. If the situation were otherwise there could be no protection of individual rights from the tyranny that would result from unbridled use of legislative power.

The distilled spirits industry in New York is basically private in nature. It is not regulated as a public utility. While admittedly subject to the sanctions of the Alcoholic Beverage Control Law, which attempt to prevent well recognized social harms that may result from undue consumption, the industry is none the less protected by basic constitutional guarantees. So long as the State allows alcoholic beverages to be sold within New York, it cannot deny members of the industry their rights under these constitutional guarantees. See *Russo v. Morgan*, 174 Misc. 1013, 1015, 21 N. Y. S.2d 637, 640 (Sup. Ct. 1940). See also *People v. Luhrs*, 195 N. Y. 377 (1908); *Wynehamer v. People of New York*, 13 N. Y. 378 (1856); *Clement v. Two Barrels of Whiskey*, 136 App. Div. 291, 120 N. Y. Supp. 1044 (4th Dep't 1910); *Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248 (1949); cf. *Levine v. O'Connell*, 275 App. Div. 217, 88 N. Y. S.2d 672 (1st Dep't 1949), *aff'd*, 300 N. Y. 658 (1949).

Although this Court in recent years has refused to strike state statutes on substantive due process grounds, language in cases brought before it has indicated that the Court will apply the constitutional guarantee when as here there is no police power purpose being served. See *Goldblatt v. Town of Hempstead*, 369 U. S. 590, 594-95 (1962); *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488 (1955);



*Cities Service Co. v. Peerless Co.*, 340 U. S. 179, 186 (1950); *Nebbia v. New York*, 291 U. S. 502, 525 (1934).

The police power rationale for the entirety of the New York ABC Law is contained in Section 2 of that law, which provides:

It is hereby declared as a policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages *for the purpose of fostering and promoting temperance in their consumption* and respect for and obedience to the law. (Emphasis added.)

Section 8 of Ch. 531, as noted, states that the particular purpose for the enactment of Section 9 was to "forestall possible monopolistic and anti-competitive practices."

Nothing in the legislative history of the new act nor in the Moreland Commission reports evidences that Section 9 was enacted to thwart any other evil. Thus, in constitutional terms, this Court must be convinced that the no higher than the lowest price provisions—maximum price limitations—were in fact enacted either to promote temperance or to "forestall possible monopolistic and anti-competitive practices."

Looking first to the economic evil that allegedly will result if maximum price provisions are not enacted, affidavits contained in the record demonstrate the belief of a professional economist (Tr. 107-114) as well as members of the industry that vigorous competition has prevailed in the past and should in all likelihood continue for the foreseeable future in the distilled spirits industry at the manufacturing, wholesaling and importing levels. Indeed, the now repealed mandatory resale price maintenance section was enacted in response to the vigorous industry competition in New York, which the Legisla-

ture felt was resulting in prices too low for the public good. See ABC Law, Section 101-c-1. Appellees have offered nothing to show that competition within the industry would be any less vital if a free market prevailed in New York today. A 1963 report on industry advertising regulation published by the Joint Committee of the States to Study Alcoholic Beverage Laws, a body composed of state liquor control board members, confirms the statements of these affidavits by asserting that members of the industry "are in a highly competitive enterprise." Joint Committee of the States to Study Alcoholic Beverage Laws, *Uniform Standards for Advertising of Alcoholic Beverages in Newspapers and Magazines*, 30 (1963). This view is further supported in Alderfer and Michl, *Economics of American Industry*, 612 (3d ed. 1957).

It is axiomatic that monopolistic and anti-competitive practices cannot be pursued where competition is vigorous, for by definition it is the very purpose of these practices to restrict competition and thus among other things deprive the purchaser of the goods in question the fair price that results from free market action and to secure an artificially high price for the benefit of the producers. See 1955 *Att'y Gen. Nat'l Comm. Antitrust Rep.*, 324.

Of course an obvious flaw in the stated purpose underlying Section 9 is the failure to define "unjustifiably higher" prices. The Legislature seems to attempt to transform a marketing reality—an actual differential between consumer price levels in New York and certain atypical markets—into an economic concept—price differentials are to be suppressed because they are warnings of possible attempts by distillers, wholesalers and importers to engage in monopolistic and anti-competitive practices. But in terms of antitrust economics an "unjustifiably higher" price can

result only when "a few persons acting together can control the prices of a commodity . . ." *American Tobacco Co. v. United States*, 328 U. S. 781, 811 (1946). This attempt to use mere retail price differentials between disparate markets as a basis upon which to predicate the potential occurrence of anti-competitive practices at the distiller and wholesaler levels emphasizes the total lack of legislative inquiry into the capacity of these segments of the industry to engage in such practices.

Competitive conditions and the cost of doing business obviously may vary widely between markets, and a producer or wholesaler of goods must be flexible enough to respond to these conditions. This is true for any product, whether it be liquor or candy, but it is especially true of liquor since the industry is subject to a wide variety of state regulation which in itself tends to affect competitive conditions in particular states. For example, lower net prices from distillers to wholesalers and from wholesalers to retailers exist in certain states because temporary promotional and advertising allowances are granted to purchasers by the sellers. In New York this practice is prohibited by Section 101-b-2(b) of the ABC Law. Because advertising allowances are forbidden in New York, distillers must bear the entire burden of this expense. An advertising allowance, an expenditure designed to stimulate sales at the expense of one's competitor, is impliedly looked upon by the New York Legislature as an anti-competitive device from which New York purchasers must be protected. In effect Section 9 of Ch. 531, requiring such allowances and discounts to be a factor in computing the lowest price given elsewhere, stipulates that distillers and New York wholesalers must indirectly give these allowances to purchasers in New York when they are forbidden by law to grant them

directly because they are not considered beneficial to the promotion of temperance. The result will be that the distiller will be forced to include advertising allowances given in other states in his New York prices, while continuing to bear the entire expense of all New York advertising. See ABC Law, Section 101-b-1.

The Legislature has set up the standard of possible monopoly, an evil theoretically existing in any industry. After establishing the evil from whole cloth, it proclaims monopoly can only be averted by demanding the lowest net prices charged elsewhere. In other words retail market price differentials are *per se* indications of an incipient monopolistic condition at the production and primary distribution levels. This view finds no support in the field of antitrust economics.

The only other reasonable basis for legislative action affecting the price at which manufacturers and wholesalers of branded distilled spirits may sell in New York is the promotion of temperance. To reiterate, in order to avoid violation of the Fourteenth Amendment to the Constitution of the United States, the New York Legislature must have detected an evil resulting from the manufacture, sale or use of alcoholic beverages which demands that maximum price limitations be placed upon the sale of these beverages by distillers and wholesalers. But, as the dissent below cogently illustrates, these maximum price provisions bear no reasonable relationship to the protection of the health, morals or welfare of the community.

The command of Section 2 of the ABC Law is a positive one; legislation regulating the manufacture, sale or use of intoxicating liquors is a proper exercise of the police power only if it *promotes* temperance. Thus, the finding of the Moreland Act Commission in support of the repeal of

mandatory resale price maintenance that price has little or no relation to temperance is not grounds for a determination that placing maximum prices upon sales of branded liquor to New York wholesalers and retailers will somehow promote temperance. That the legislative enactment may have no deleterious effect upon temperance is immaterial. To accord with Section 2 of the ABC Law, the statute must *affirmatively promote temperance*.

This result is in accordance with the position the distilled spirits industry occupies in the State of New York. As noted it is, first of all, a private industry, unlike public utilities, and is operated in the same general manner as other private industries. However, pursuant to Section 2 of the ABC Law, it is subject in New York to intensive regulation "Because of the many evils attendant upon traffic in liquor. . . ." *Calvary Presbyterian Church v. State Liquor Authority*, 245 App. Div. 176, 178, 281 N.Y. Supp. 81, 85 (4th Dep't 1935), *aff'd*, 270 N. Y. 497 (1936). Heretofore, in New York any challenge to the constitutionality of enactments affecting intoxicating liquors has been decided by the test of whether the challenged enactment met the legislative purpose of promoting temperance announced in Section 2. See *People v. Ryan*, 274 N. Y. 149, 152 (1937); *People v. Tourists International, S.A.*, 40 Misc. 2d 99, 105, 242 N. Y. S. 2d 756, 762 (Sup. Ct. 1963).

It is patent that fixing maximum price limits upon which manufacturers and wholesalers of branded distilled spirits may sell in New York in order to assure purchasers the lowest possible price for these liquors does not promote temperance. As it was put in Chief Judge Desmond's dissenting opinion below, "To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of

excessive smoking by abolishing cigarette taxes" (Tr. 355-356).

Appellants, in view of the Moreland Act Commission's determination that the propensity to drink is unrelated to the price at which liquor is sold, cannot see how an argument can be made that a statute avowedly designed to accord the lowest possible price to New York liquor consumers can in fact affirmatively serve to ensure that these consumers are temperate in their use of these beverages. Can it be argued that the interests of moderation in alcoholic beverage consumption will be affirmatively advanced if consumers obtain the lowest possible prices for nationally branded spirits but not for private label brands and wines? Will alcoholism, public drunkenness and sales to minors be reduced if liquor is made more accessible through lower prices? These questions are answered by the asking.

**B. Section 9 is Arbitrary and Unreasonable.**

Assuming arguendo that these maximum pricing provisions function to promote the health, safety and welfare of the general populace, they still violate the Fourteenth Amendment to the Constitution. This is so because Section 9 imposes unreasonable, arbitrary and capricious burdens upon appellants which do not serve to remedy the purported evil. See *Goldblatt v. Town of Hempstead*, 369 U. S. 590 (1962); *Nebbia v. New York*, 291 U. S. 502 (1934).

Bearing in mind that this is special antitrust legislation directed to possible "monopolistic and anti-competitive practices," it becomes clear that this maximum price measure regulating the distilled spirits industry is unreasonable. This becomes apparent merely by juxtaposing Section 9 of Ch. 531, whose rationale as we have seen is the same as other antitrust acts, with the terms of these acts. None of

them, state or federal, in order to protect vigorous competition provides that sales can be made only if the sellers agree to charge maximum prices based upon the lowest price given elsewhere in the United States. Direct interference with free market pricing structures is inimical to the rationale of these acts which is a belief in free and unfettered competition.

The legislation is arbitrary, capricious and unreasonable in several other respects. The law is penal in nature, see section 101-b-3(j), and one signing the affirmations that the price filed for a particular brand in the monthly price schedule is no higher than the lowest price offered anywhere else in the United States does so at his peril.

The problems of determining the price at which a distiller's brands are sold by wholesalers to retailers are particularly grave. Section 101-b-3(f) requires the distiller to affirm that the price at which New York wholesalers who are "related persons" will sell to retailers in the next succeeding month is no higher than the lowest price at which wholesalers doing a substantial business in the distiller's brands in other states sold those brands during the immediately preceding month.

Most of the wholesalers to whose prices the distillers must attest are independent businessmen and are under no legal obligation to give information as to their prices or the quantity of the business they do in a particular distillers' brands to the distillers. Thus, for example, a distiller may sell his brand to an independent Chicago wholesaler, who does a substantial volume of business in the distiller's brands. The Chicago wholesaler, permitted by law, may charge a net price to retailers that includes various discounts and promotional allowances. These discounts and



allowances are not published in any trade journal. But before a New York wholesaler who is deemed to be a "related person" can sell that brand to New York retailers, the distiller must have verified an affirmation that the price schedule filed by the New York wholesaler lists a price to New York retailers that is no higher than the lowest price at which the Chicago wholesaler sold that brand during the preceding month.

The record shows that independent wholesalers in other states, under no legal compulsion to do so, may not furnish such information to the distillers (Tr. 118, 122, 123). Section 101-~~b~~-3(f) will prevent a large group of New York wholesalers from selling branded distilled spirits to retailers in New York; it will require distillers to threaten to refuse to sell to wholesalers elsewhere in the United States unless such information is delivered, a type of coercion that would appear to be objectionable under federal antitrust laws. See *F. T. C. v. Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960); *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d 1 (7th Cir. 1959).

The majority opinion below fails to evince concern over this situation. Nor does it even acknowledge that distillers and New York "related person" wholesalers—both in their own way dependent upon obtaining pricing information from wholesalers throughout the country—have no legal means by which they can obtain the information needed to satisfy the command of Section 9.

Section 9 is also unreasonable because it exposes distillers to extortionate practices at the hands of "related person" wholesalers in other states. Once again, taking the example of the Chicago wholesaler who does a "sub-

stantial" part of his business in the brands of one distiller, assume that out of vindictiveness or in an attempt to extort various concessions from the distiller, this Illinois wholesaler threatens to or does sell one case of each of the distiller's brands several dollars below the ordinary case price. The predicament in which this maneuver would place the distiller is obvious. He could not sell the brand in New York for the month in question unless New York "related person" wholesalers file a price schedule containing the extortionate price charged by the Chicago wholesaler. Of course, the New York distiller to wholesaler price would have to be adjusted accordingly. The loss to the distiller in actual profits and in the good will of New York wholesalers would be enormous. All this because of the sale of one case by a reprehensible wholesaler.

Taken one step further, the one case sale at the unjustified lower price would place New York wholesalers in an intolerable position. If "related person" wholesalers chose the course of filing the Chicago wholesaler's case price for the brand rather than not selling it at all, non-related person New York wholesalers, otherwise free to sell at a price of their own choosing, would either be forced to meet this price or face the loss of sales to those selling at the lower price. Retailers would stockpile large orders at the lower per case price which would cause wholesalers and distillers irreparable loss even if the normal price were soon restored.

If "related person" wholesalers chose not to sell the brand at all during the period rather than sell at the cut price per case, non-related person wholesalers, free to sell at a price of their own choosing, could thus charge an "unjustifiably higher" price because of the freedom from competition with the "related person" wholesalers. In any event, they would have the entire New York market to themselves

for at least a month. The "related person" wholesalers, aside from being penalized the loss in sales, might permanently lose customers to the non-related person wholesalers. The statute thus gives any "related person" wholesaler anywhere in the country the power to blackmail appellant-distillers. This condition could also permit collusion between a distiller and an out of state wholesaler, with the result that the wholesaler could sell the brands of the distiller's competitor at prices so low as to prevent the competitor from being able to market his brands in New York. The collusive distiller would then enjoy a marked competitive advantage in New York for the period his competitor was faced with the dilemma of selling at a severe loss in New York or not selling at all and risking the loss of his New York market. That such a fantastic spectacle is without the bounds of reason can hardly be questioned.

There is another glaring defect in the requirement of Section 9 of Ch. 531 that "related person" wholesalers located in New York sell to New York retailers at a price no higher than the lowest sold by "related person" wholesalers elsewhere in the United States. The section makes no allowance for variances in wholesaler cost and profit margins, two figures that fluctuate widely throughout the United States because of such factors as differences in wages, local sales and gross receipts taxes, overhead and number of retail licensees serviced. Thus, New York wholesalers, who enjoy one of the lowest profit margins and endure one of the highest percentages of operating costs, see p. 17, *supra*, must offer New York retailers a price which may have been offered to retailers in other states by a wholesaler who enjoyed a much higher operating profit and a much lower percentage of net operating expense.

The gross inequity of this provision is patent, for New York wholesalers are at the mercy of those operating in other states who, of course, care nothing for the plight of New York wholesalers but are only concerned with competitive conditions in their own market. The obvious effect of such a provision will be that those New York wholesalers unable to exist by the standards prevailing in another market will be driven out of business. The bitter irony of this situation is apparent—a statute ostensibly devised to limit monopolistic practices and encourage free price competition will inevitably have the effect of reducing the number of wholesalers and establish a much more fertile field for monopoly operations. Such obvious unreasonableness cannot be sanctioned by this Court.

In summary this Court must conclude that with present antitrust laws readily available to achieve the professed legislative goal without penalizing the innocent as well as those who may be guilty of anti-competitive practices in the future, Section 9 of Ch. 531 is patently arbitrary and unreasonable because it does not lead to a reasonable expectation of achieving the state's objective and it forces "related person" New York wholesalers to price their merchandise in accordance with conditions prevailing in other markets. This result surely presents a federal question of substance.

**C. Section 9 is Intolerably Vague.**

It is well established that a legislative enactment requiring prospective action and imposing criminal penalties for failure to act correctly is violative of due process of law unless its terms are sufficiently clear for a man of reasonable intelligence to comply with them.

It cannot be overemphasized that a statute which makes criminal conduct otherwise lawful must, by its nature, "be

more definite than civil statutes." Note, *Due Process Requirements in Statutes*, 62 Harv. L. Rev. 77, 85 (1948); see *Winters v. New York*, 333 U. S. 507, 515 (1948).

As heretofore pointed out, what is now Section 101-b-3(f) of the ABC Law requires brand owners of liquor to file a verified affirmation that the price of wholesalers selling the brand owner's brands to New York retailers is no higher than the lowest price charged by "such brand owner . . . or any related person" to any retailer elsewhere in the United States. The definition of a "related person" includes any person

. . . (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent . . . ABC Law, Section 101-b-3(d)(f).

The act and the regulations recently promulgated pursuant thereto by the State Liquor Authority have segregated those who sell liquor to New York retailers into the following categories.

If one is a brand owner or a person "related" to the brand owner, the price charged to New York retailers can be no higher than the lowest charged elsewhere in the United States by the brand owner or a non-New York "related person." The brand owner is charged with affirming and verifying this price to be no higher than the lowest charged elsewhere. See ABC Law, Section 101-b-3(f); Rule 16 of the State Liquor Authority, as amended.

If, however, a New York wholesaler is willing to affirm he is not "related" to the brand owner, he may then avail himself of the less rigorous requirements of Section 101-b-3(g). As interpreted by amended Rule 16 of the recent regulations, paragraph (g) requires a non-related person wholesaler selling to New York retailers to affirm only that

his prices to retailers in other states are no lower than those he has filed in his New York price schedule.

Patently, if one sells to New York retailers only he can charge any price he pleases, unlike his "related person" competitor, who has his maximum price determined as the lowest price charged by any other "related person" wholesaler elsewhere in the United States. If one does sell to retailers in another state and is not a "related person", he must file a New York price no higher than the lowest price he charges in any other state.

The obvious question is how does one ascertain exactly who is a "related person." The question is hardly academic to one charged at the risk of criminal penalty and the loss of license with affirming that a "related person" elsewhere in the United States did not sell either to wholesalers or retailers, as the case may be, at a price lower than that contained in the price schedules of New York "related person" wholesalers for a particular month. Further, how can wholesalers know if they are related persons, interdicted from selling to their customers until the brand owner files his affirmation, or if they retain the traditional free enterprise right to sell at a price of their own choosing.

Appellants submit that there is no way of determining who these wholesalers are and that manufacturers charged with affirming that these wholesalers' prices are the lowest given elsewhere have no standard by which to avoid the criminal penalties of the act.

There are some 900 licensed wholesalers operating throughout the United States. Of these some may do as much as 80 per cent of their business in the brands of a particular brand owner. From this high point, the percentage decreases to a very small level. These percentages are also representative in New York. At what stage in this

spectrum is a brand owner safe in assuming that a particular wholesaler is a related person or a wholesaler in assuming he is not? Is it 40 per cent, 50 per cent, 20 per cent? And if a wholesaler only does 3 per cent of his business in the brands of a particular brand owner but that 3 per cent represents his profit margin, can one safely say that the wholesaler does not do a substantial part of his business in the brands of the brand owner concerned? It is assumed that "exclusive" means 100 per cent, but when it comes to determining what "principal or substantial" means one required to file an affidavit at the peril of up to six months in prison is not furnished with the constitutional guidelines required by the authority cited above.

An example of how small a percentage the word "substantial" may encompass in an antitrust context is given in the case of *Brown Shoe Company v. United States*, 370 U. S. 294, 327 (1962), an antitrust case in which it was found that a shoe manufacturer with less than 5 per cent of the market nevertheless had a sufficient share of that market to allow it "to substantially lessen" competition. See also *Standard Oil Co. of California v. United States*, 337 U. S. 293 (1949) (6.7% of the area market in question); *International Salt Co. v. United States*, 332 U. S. 392 (1947) (\$500,000 volume considered substantial *per se*).

Since it is to a New York wholesaler's advantage not to be designated a "related person", there is every likelihood that brand owners, attempting to avoid criminal penalties by affirming the price schedules of many wholesalers, will come into conflict with wholesalers who deny they are related. Such disharmony could well militate against the achievement of an orderly pattern of liquor distribution which it is the purpose of the ABC Law to encourage in seeking to



achieve its overall goal of promoting temperance. See ABC Law, Section 101-b-1. But as the law now stands a wholesaler has no recourse to state authorities if a distiller should decide the wholesaler conducts a "substantial" part of his business in the brands of the distiller. The wholesaler's right to price freely can thus be abrogated by an act over which he has no control.

In sum, one is forced to grope in the dark and make arbitrary decisions as to which of his many purchasers is a statutory "related person." Should he guess wrong he may go to prison, his firm may lose its license and the wholesalers of New York, who have no hand in determining who is a related person, may nevertheless be prevented from selling the merchandise involved to New York retailers. It is difficult to imagine a more clear cut example of unconstitutional burdens arising from the vagueness of a statute.

## POINT V

**The no higher than the lowest price provisions of Section 9 of Chapter 531, 1964 New York Session Laws, deny appellants equal protection of the laws guaranteed by the Constitution of the United States.**

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The essence of this constitutional requirement is that all those similarly situated must be treated alike. That is, legislation cannot constitutionally discriminate in its application between those in a group having definite attributes of identity. *Reynolds v. Sims*, 377 U. S. 533 (1964); *McGowan v. State of Maryland*, 366 U. S. 420 (1961).

With these guidelines in mind, it becomes necessary to examine Section 9 of Ch. 531 to ascertain if discrimination against members of the same general class has been effected. Wholesalers in New York who somehow are determined not to be "related persons" are unaffected by Section 9. See ABC Law, Section 101-b-3(g); State Liquor Authority, Rule 16, as amended. Insofar as the statute is concerned they can sell the same brands sold by "related person" wholesalers at any price they choose. Yet it has been seen that "related person" wholesalers will not be able to sell branded liquor until receiving an affirmation from the brand owner that the price schedule filed by the wholesaler lists a price no higher than the lowest at which the brand owner or wholesalers in other states who come within the definition of related persons sold the product in the immediately preceding month.

If the brand owner for any reason fails to file such an affirmation, the New York related person wholesaler is prevented from selling the brand for at least a month. ABC Law, Section 101-b-3(h). On the other hand the unrelated New York wholesaler will be able to sell that very brand at a price of his own choosing. These New York wholesalers will certainly enjoy a marked competitive advantage. As the cases clearly indicate, such discrimination between those having no marked distinguishing characteristics is prohibited by the equal protection clause.

In upholding the statute, the majority of the court below failed to discuss this example of prohibited legislative discrimination.

The treatment given to private brands by the legislation in question is another example of unconstitutional discrimination. Distilled spirits marketed as "private brands"

owned by a New York retailer are not subject to the provisions of Section 9 of Ch. 531. Yet private brands in 1963 accounted for 12 per cent of New York's retail package store sales in stores handling private labels. These labels are sold in direct competition with nationally branded items. They often enjoy a competitive advantage as the brand-owner retailer, making a larger profit on his private brands, will often attempt to convince a consumer to select the private label in preference to a nationally marketed brand. No legislative determination to the effect that owners of private labels are less likely to charge unreasonably high prices as opposed to sellers of nationally branded distilled spirits exists. And yet brand owners of nationally branded liquors are forced to undergo added expense and face possible criminal penalties, in addition to risking the loss of their license, while those owning private label brands are exempt. It is this type of discrimination which is clearly prohibited by the equal protection clause of both the State and federal Constitutions.

In summary it is believed that there is no legitimate basis for discriminating against manufacturers and related person wholesalers of branded distilled spirits whose products are sold in the same retail outlets and in competition with private label brand liquors. It cannot be doubted that compliance with Section 9 of Ch. 531 will be a costly and burdensome process at best. To make manufacturers and "related person" wholesalers of branded distilled spirits risk their right to do business in New York and not impose the same conditions upon other wholesalers, or upon private label owners is clearly an improper discrimination. It is the purpose of the equal protection clause to prevent just such discrimination.

## POINT VI

**Certain provisions of Section 7 of Chapter 531, 1964 New York Session Laws, also violate the federal constitution.**

Section 7 of Ch. 531 would require brand owners to file schedules of their prices to wholesalers "irrespective of the place of sale or delivery." This new requirement can only mean that sales by brand owners to all wholesalers in every state must be filed with the State Liquor Authority.

The rationale for this provision is obvious; it will provide the Authority with an aid in policing the lowest price affirmations of Section 9 of Ch. 531. Regardless of purpose, the commerce clause of the federal constitution does not permit New York to require brand owners to file this information regarding their operations in other states. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 154 (1963).

Section 7 also requires the basic price schedules to contain "the net bottle and case price paid by the seller." By its terms Section 7 applies to all brand owners of liquor, vintners of wine and wholesalers of both, but amended Rule 16 of the State Liquor Authority has confined its impact only to importers and wholesalers of distilled spirits by exempting vintners and distillers from the requirements of the express statutory terms.

It is submitted that not only does this discriminatory rule exceed the authority of the State Liquor Authority in that it is an attempt to amend legislation rather than supplement it, see *Kasper v. O'Connell*, 38 Misc. 2d 3, 237 N. Y. S.2d 722 (Sup. Ct. 1963); *Kaplan v. McGoldrick*, 198 Misc. 440, 100 N. Y. S.2d 45 (Sup. Ct. 1950); *New York City Housing Auth. v. Knowles*, 200 Misc. 156, 103 N. Y. S.

2d 270 (Munic. Ct. 1951), but that there is no valid reason for requiring this information. The Legislature is concerned in Ch. 531 with the lowest price charged by manufacturers, importers and wholesalers to their customers, not with the cost of the goods to these sellers. Further, the difference between the price paid by the seller and the price he charges his customer can be misleading, for there is no provision to reflect the seller's expenses which, as pointed out, leaves New York wholesalers with one of the lowest margins of profit among distilled spirits wholesalers in the United States. This requirement will erroneously convince one's customers that the seller is enjoying an inordinate profit and will lead to an unjustifiable call for still lower prices. Certainly no more capricious and constitutionally unreasonable act can be imagined than one having no relation even to the avowed legislative purpose.

### CONCLUSION

This case raises questions of far-reaching social and economic importance, which can be answered only by resolving several acute issues of federal constitutional law, including:

1. Is a state statute which fails to promote temperance, but which fixes maximum prices for distilled spirits in one state at a price no higher than the lowest price charged in any other state and thereby levies a major economic burden on the consumers of distilled spirits in other states, validated by the 21st Amendment to the Constitution of the United States?
2. Is not a state statute requiring distillers and wholesalers of alcoholic beverages to sell at a price no higher than the lowest price charged in any other state in conflict

with the terms and policy of the Robinson-Patman and Sherman Antitrust Acts, and thus violative of the supremacy clause of the Constitution of the United States?

The final judgment of the Court of Appeals of the State of New York requires this Court's review.

Respectfully submitted,

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## APPENDIX A

IN THE

### COURT OF APPEALS OF THE STATE OF NEW YORK

JOSEPH E. SEAGRAM & SONS, INC., et al., Appellants *v.* DON-  
ALD S. HOSTETTER et al., Constituting the State Liquor  
Authority, et al., Respondents.

Decided July 9, 1965.

BERGAN, J. In 1963 in response to malfunctions in the administration of the State's liquor law and public dissatisfaction with controls on the sale of alcoholic beverages, the Governor appointed a Moreland Commission directed to make a "study and reappraisal" of the law.

In appointing the commission the Governor noted that since the enactment of the Alcoholic Beverage Control Law in 1934, soon after the end of prohibition, there had been "no major reappraisal or revision of the law in the light of experience and current social problems and economic conditions".

The commission addressed itself, among other things, to the price of liquor in New York and the effect of price on temperance in the use of liquor. One of the basic assumptions of the statute then in effect was that, if the price of liquor were cheap, its consumption would increase and the policy effected by the statute was to sustain the price.

Former section 101-c of the Alcoholic Beverage Control Law had authorized a manufacturer who was a "brand" owner to fix the minimum retail prices for that brand, for the violation of which the retailer was subject to discipline by the State Liquor Authority (subd. 7). The

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statute (§ 101-b, subd. 3) had for over 20 years also provided for filing price schedules by brand owners and wholesalers.

The commission's studies led it to believe that the assumed favorable relation of high-priced liquor to temperance was chimerical. The prices of liquor in New York were high, but consumption had steadily risen and this did not indicate high prices increased temperance. It found "a greater than average" increase in per capita consumption in New York (Moreland Comm. Report No. 1, p. 3).

The principal benefit from the minimum price requirement for liquor in New York went to the liquor interests. This served "merely", said the commission, "to insure profit margins of the various segments of the industry" (Report No. 3, p. 19, offered as Exhibit E by plaintiffs at Special Term) and "The argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it" is "unfounded" (*id.*, p. 17).

Its studies showed no correlation between consumption and prices, looking at the experience in States in which prices were high compared with those in which they were low.

It found in effect gross price discrimination against the New York consumer by the industry. It developed that the retail price for a fifth of a well-known brand of liquor was lower in Washington, D. C., than the wholesale price in New York. One brand, for example, cost \$2.85 retail in Washington and \$3.45 wholesale in New York, another \$3.39 and \$4.15 respectively (see Report No. 3, pp. 5, 6).

This report adds: "For almost every fifth of whiskey that he buys, the New York consumer pays 50 cents to \$1.50 more than the price at which it is available in at least seven freer price markets" (p. 3).

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On the basis of these reports the Governor made recommendations to the Legislature (Message, Feb. 10, 1964). He observed that the administration of the State's liquor law had been marked by "periodic instances of corruption and favoritism". He noted the favored position of the liquor industry in an area which was the subject of public regulation and that the Moreland Commission had reported "it is contrary to the public interest to have the regulated industry in such a dominant role". He added that the commission had sought means of "Bringing justice to the consumer by putting to an end the artificial devices whereby the liquor industry has received uniquely beneficial treatment at the consumer's expense."

The Governor also noted that as a result of the distiller-fixed consumer prices under the statute a "surcharge" had been "foisted on New Yorkers" of \$150 million a year over what would have been paid in a free market.

The result of the commission study and the Governor's recommendations was the enactment of a statute by the Legislature (L. 1964, ch. 531) which, among other things, vitally changed the direction of liquor price policy in New York and sought to reduce consumer prices.

This suit is maintained by 62 distillers and wholesalers of alcoholic beverages and some importers against the State Liquor Authority and the Attorney-General to declare the provisions of the 1964 statute invalid. The main attack is directed to section 9 of the statute; the other is directed to certain parts of section 7. The court at Special Term in a comprehensive opinion granted judgment for defendants; the Appellate Division affirmed.

In changing the direction of its policy which had been to prevent prices from going too low by establishing effective devices pursuant to which the liquor industry could in effect fix minimum retail prices on brand liquors, the

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Legislature by section 9 of the 1964 statute set up means which sought to keep down the prices of brand liquors to the consumer. The mechanism is a simple one and it lies technically in the control of the liquor industry. But it is a mechanism to which plaintiffs take vigorous exception on a diversified number of grounds.

The provision is this: On filing the schedules of brand owners' prices to wholesalers, which for 20 years had to be filed monthly under the former provisions of section 101-b, the brand owner or his designee must file an affirmation "that the bottle and case price" to wholesalers in New York "is no higher than the lowest price at which such item of liquor" was sold the previous month to any wholesaler elsewhere in the country or any State or State agency operating a public liquor enterprise (§ 9).

Thus it was sought to end the discrimination by the liquor industry against the New York consumer which, as the commission had found, cost the New York consumer \$150 million a year above that which a free market would have offered.

This change from a favored and protected profit position to a possibly sparse profit situation may make it economically difficult for the liquor industry. If it does it is within the competence of the New York Legislature to make it that way. Even without article XXI of the Amendments to the United States Constitution, New York could end the liquor traffic within its borders entirely. The State of Mississippi, for example, prevents the plaintiffs or anyone else from selling liquor there and no one doubts its power to do so. But the Twenty-first Amendment spells out an additional specific and federally protected right of each State to eliminate as well as regulate the liquor traffic within its borders (*Mahoney v. Triner Corp.*, 304 U. S. 401).

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A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture.

If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of opinion they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers.

In effect the dependence of the New York price on the maximum price of the distiller for his brand elsewhere is to tie the price in this State into a national price. There is nothing unreasonable about that. It is not an interference with interstate commerce. The effect is on what the distiller charges here and is an effect closely associated with the sale and distribution of liquor within the State.

That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a device within the power of the State to employ in this regulated activity.

There is in the record proof offered at Special Term by plaintiffs in an exhibit (Exhibit C) attached to the affidavit of Thomas F. Daly) consisting of excerpts of the testimony before a legislative committee of Judge LAWRENCE E. WALSH, the Moreland Commissioner, who personally opposed the kind of regulation prescribed by section 9, in which the statement is made that in the liquor

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industry "the whole sum total of that relationship averages out to a price that is average across the country".

He cited Pennsylvania, a monopoly State, "the largest purchaser of liquor in the world \* \* \* \$400,000,000 worth of liquor a year—one customer" as being an example of a customer who insists "on the lowest price that the distiller offers anywhere in the country".

In the light of this kind of national marketing situation, the actual difficulty of the distiller in seeing to it that the New York buyer pays no more than "the lowest price" elsewhere seems greatly overstressed.

Under section 9 the distillers themselves control the base price since they fix the lowest price elsewhere. If its effect on New York is too low a price they have it within their power to raise the lowest price elsewhere. The industry must absorb any differential cost in doing business as one of the incidents to a highly regulated industry. The incidental effect of this on prices in another State does not invalidate the New York statute.

The requirement of section 9 is not, indeed, unusual in concept and those States which have State liquor monopolies, we are told, require the distillers to warrant that the price charged the State monopoly for brand liquors is no higher than the price charged in other States. Thus we think the price regulation in the 1964 statute is neither impossible of compliance nor unreasonable.

It is thoroughly settled that when it comes to the regulation of liquor traffic a wide area of public power may be exercised in plenary fashion by State governments without Federal interference either under the commerce clause or under the equal protection provisions of the Constitution.

A leading decision is *State Bd. v. Young's Market Co.* (299 U. S. 59) where the court in an opinion by Mr. Justice BRANDEIS sustained a State statute imposing a license fee



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for the privilege of importing beer from other States against the argument that it violated both the commerce clause and the equal protection clause.

In the same direction is *Mahoney v. Triner Corp.* (304 U. S. 401, *supra*); again in an opinion by Justice BRANDEIS the court sustained a Minnesota statute imposing additional processing conditions on liquor coming from other States, a statute which the court noted "clearly discriminates in favor of liquor processed within the State against liquor completely processed elsewhere" (p. 403).

Similarly discriminating statutes in Michigan which prohibited dealers in beer there from selling beer manufactured in other States which in turn discriminated against beer manufactured in Michigan (*Brewing Co. v. Liquor Comm.*, 305 U. S. 391) and to the same effect in Missouri (*Finch & Co. v. McKittrick*, 305 U. S. 395) were each sustained. The statute before us could scarcely be deemed to have as much impact on the plaintiffs' Federal rights as these.

In *Ziffrin, Inc. v. Reeves* (308 U. S. 132, 138) a Kentucky statute confining the transportation of liquor to licensed common carriers was sustained, with Mr. Justice McREYNOLDS propounding the question: "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions?" And making the answer: "Former opinions here make affirmative answer imperative."

As the Appellate Division opinion noted, nothing in the later decisions of the court upon which appellants mainly rely suggests that the basic power of New York to control the liquor traffic has been impaired. The holding of *United States v. Frankfort Distilleries* (324 U. S. 293) is merely that liquor producers, wholesalers and retailers may not conspire unlawfully to fix prices in viola-

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tion of the Sherman Anti-Trust Act (U. S. Code tit. 15, § 1 *et seq.*). Nothing in that decision sustains any part of plaintiffs' contention.

And *Hostetter v. Idlewild Liq. Corp.* (377 U. S. 324) and *Department of Revenue v. James Beam Co.* (377 U. S. 341) are irrelevant to the case before us. The principles announced in the earlier cases were re-enforced in 1958 in the denial of the application of California to file a bill of complaint against Washington (*California v. Washington*, 358 U. S. 64).

On the general exercise of State powers in matters affecting the welfare of a State and its people, liquor aside, see *Hoopeston Co. v. Cullen* (318 U. S. 313); *Huron Cement Co. v. Detroit* (362 U. S. 440); *Osborn v. Ozlin* (310 U. S. 53).

The provisions of section 9 are not transformed into an "antitrust measure" in conflict with the supremacy clause on the basis of plaintiff's conception that the statute is not "a device to promote temperance"; nor are they for similar reasons in conflict with the Robinson-Patman Act (U. S. Code, tit. 15, § 13 *et seq.*). It is a strained argument to make, as plaintiffs do, that liquor is the equivalent of an unlawful conspiracy to violate the Sherman Act; and it is almost equally strange to say that, because New York tries to correct an evil in the sale of liquor by providing price criteria operative here, it "will \* \* \* impair \* \* \* the successful operation of alcoholic beverage control laws in other states".

Plaintiffs also attack the validity of portions of section 7 of the 1964 statute which require that filed price schedules show the bottle and case price paid by a retailer, and the portion of the section which prohibits sale or purchase by a wholesaler unless schedules are filed by brand owners "irrespective of the place of sale or delivery".

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It is said by appellants that those requirements "can only mean" that sales by brand owners "in every state" must be filed with the New York Authority.

The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intrastate sale of liquor.

Throughout the argument of plaintiffs on constitutional and other issues runs the thread of their contention that the 1964 statute is not suited to the promotion of temperance and hence the main justification of a valid regulation of liquor is lost.

In summarizing their position in a reply brief plaintiffs say: "At issue here is whether Section 9 of Ch. 531 affirmatively promotes temperance". As to what best promotes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry.

The order should be affirmed, with costs.

Chief Judge DESMOND (dissenting). Of plaintiffs' several serious and impressive arguments against the validity of sections 7 and 9 of chapter 531 of the Laws of 1964, one remains unanswered and to my mind unanswerable. It comes down to this: mandatory establishing of minimum prices for sales by bottle or case of "brand name" alcoholic beverages is beyond the power of our State legislation, is an unconstitutional (U. S. Const., 5th and 14th Amdts.; N. Y. Const., art. 1, § 6) taking of private property without due process or compensation, and is not justified as a police power exercise since it is not neces-

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sary for or related to the health, safety, morals or welfare of the State's inhabitants or required by any emergency. Bringing New York State liquor prices into line with those of comparable localities may accord with some concepts of fairness, and our people may have cause to complain about marketing and pricing practices of plaintiffs which are said to result in the charging of premium prices in the package stores of New York State. But we are talking now about constitutional protections against arbitrary interferences by government with free price markets. Statutory price controls on food, housing accommodations or other essentials of life is a valid exercise of the State's far-ranging police power which is born out of public needs (*Nebbia v. New York*, 291 U. S. 502, 525 *et seq.*). Those items are regulated as to price because they are among the "great public needs" referred to in *People v. Nebbia* (262 N. Y. 259, 270). But even the police power is limited and the courts have the same duty to nullify unconstitutional legislative acts as to uphold statutes which satisfy or tend to satisfy or may reasonably be expected to satisfy some health, safety or welfare need. If no such relevance is discoverable, a statute infringing on the constitutionally protected rights of private property in price-fixing or similar restraints must fall (*Defiance Milk Prods. Co. v. Du Mond*, 309 N. Y. 537; *Trio Distr. Corp. v. City of Albany*, 2 N. Y. 2d 690; *Loblaw, Inc. v. New York State Bd. of Pharmacy*, 11 N. Y. 2d 102). In each of those three cases we held a statute violative of the due process because it needlessly and arbitrarily forbade an otherwise valid business practice.

No one will question the traditional rights of the States (taken away by the Eighteenth Amendment but restored by the Twenty-first) under their inherent police power to prohibit, restrain or regulate the manufacture, sale and use of intoxicants (*Matter of Trustees of Calvary Presbyt.*

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*Church v. State Liq. Auth.*, 245 App. Div. 176, 178, *affd.* 270 N. Y. 497; *Mahoney v. Triner*, 304 U. S. 401). The New York Legislature has power to enact a variety of laws calculated to suppress intemperance or to minimize the known evils of the liquor traffic, since the trade is one as to which there is a recognized public interest. But "police power" is not a magic incantation to frighten off judicial investigation into the constitutionality of statutes. The State of New York could completely outlaw the sale of liquor but, having chosen instead to regulate it, the restrictions and requirements can be such only as are necessary to protect public safety, health and morals from the evils, known or apprehended, of the trade. The State's licensees may be subject to the strictest supervision and control (as scores of appellate court decisions in this State attest) but such supervision and control must at least tend to preserve public order and discourage the intemperate use of alcohol. No one has yet told us how any of these lawful purposes could be accomplished or furthered by forcing liquor prices down to the bottom level found anywhere in the United States. To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of excessive smoking by abolishing cigarette taxes.

This statute cannot be saved by recourse to the familiar aphorisms about presuming a statute's constitutionality or presuming that investigation has shown necessity, or avoiding the substitution of a court's judgment for a Legislature's, or the like. Those who attack a price-fixing law have the burden of showing its unconstitutionality beyond any reasonable doubt (*Lincoln Bldg. Assoc. v. Barr*, 1 N. Y. 2d 413) but that burden is met when the attackers show as they do here that the only reason suggested or available for its enactment—that is, eliminating "price discrimination" against our State's residents has no relationship to any

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public need or evil of the kind which justifies use of the police power (*Defiance Milk Prods. Co. v. Du Mond*, 309 N. Y. 537, 540-541, *supra*). Indeed, in section 8 of those 1964 amendments to section 101-b of the Alcoholic Beverage Control Law, the Legislature has forthrightly told us that its purpose and interest was solely to reduce the prices charged for brand-name liquor in this State. That was a long retreat from the old announced policy (see old § 101-c as enacted in 1950) of promoting temperance by eliminating price wars, by prohibiting sales below announced minima and by mandating resale price maintenance. It is a *non sequitar* that, since artificially jacking up the prices under earlier statutes did not promote temperance, forcing them down to the lowest levels in the whole country will be a step toward moderation in use.

It is suggested that we should respect and accept the judgment of the Legislature and the Governor that price limitation will further temperance. But the assumption that such was the purpose runs against the declared fact. Neither the Governor nor the Legislature ever offered such a vain argument, and we must remember that sections 7 and 9 were not among the recommendations of the distinguished Moreland Act Commissioners appointed by the Governor. Temperance is a laudable objective and a proper State purpose but no one has the temerity to assert that cut-price liquor cuts down drinking. Therefore, it follows of absolute necessity that these amendments have nothing to do with the State policy written into section 2 of the State Alcoholic Beverage Control Law right after repeal of National Prohibition: "to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law."

Even if these statutes could survive Federal constitutionality tests they are void for arbitrariness under our own

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decisions such as *Defiance Milk Prods. Co. v. Du Mond* (309 N. Y. 537, *supra*); *Trio Distr. Corp. v. City of Albany* (2 N. Y. 2d 690, *supra*); *Grove Hill Realty Co. v. Ferncliff Cemetery Assn.* (7 N. Y. 2d 403, 410), and *Loblaw, Inc., v. New York State Bd. of Pharmacy* (11 N. Y. 2d 102, *supra*). Police power statutes under the New York State Constitution are valid only if the legislation is addressed to a legitimate end and, also, if the measures taken are reasonable and appropriate to that end (*Matter of People [Tit. & Mtge. Guar. Co.]*, 264 N. Y. 69, 83)—that is, such a statute must be reasonably related and applied to some actual and manifest evil". (*Defiance Milk Prods. Co. v. Du Mond*, *supra*, p. 541; *Twentieth Century Assoc. v. Waldman*, 294 N. Y. 571, 580, app. dismd. 326 U. S. 697; *East N. Y. Sav. Bank v. Hahn*, 293, N. Y. 622, 627 affd. 326 U. S. 230; *Matter of Department of Bldgs. of City of N. Y. [Philco Realty Corp.]*, 14 N. Y. 2d 291, 297.) The only "evil" against which this legislation is directed is found, apparently, in the fact that some people somewhere in this country under other unknown and uninvestigated conditions buy liquor more cheaply than we do. If this be good law, similar statutes may be passed as to any sale-licensed commodity.

I do not, although I do not discuss them at length, overlook a number of other troublesome aspects of these amendments. These difficulties may be summed up by the statement that it is wholly arbitrary to force New York State liquor prices down to the lowest level prevailing anywhere in America, despite higher license fees charged in this State, despite higher wages and salaries here (and conversely a small volume of sales by some of the distributors-plaintiffs), despite the fact that abnormally low prices somewhere in the country may be due to temporary conditions totally unrelated to New York State prices, and despite the predictable and remarkable result that the distillers now may (or must) raise prices elsewhere in order



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to reap even a better harvest in the enormous New York State market.

The judgment should be reversed and judgment directed for plaintiffs as demanded in the complaint, with costs in all courts.

Judges DYE, VAN VOORHIS and SCILEPPI concur with Judge BERGAN; Chief Judge DESMOND dissents and votes to reverse in an opinion in which Judges FULD and BURKE concur.

Order affirmed.

**APPENDIX B**  
**SUPREME COURT**  
**APPELLATE DIVISION**  
**THIRD JUDICIAL DEPARTMENT**

May 13, 1965.

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JOSEPH E. SEAGRAM & SONS, INC. et al.,  
*Appellants,*  
v.

DONALD S. HOSTETTER et al., Constituting the State Liquor  
Authority, and LOUIS J. LEFKOWITZ, Attorney General  
of the State of New York,  
*Respondents.*

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*Per Curiam.*

APPEAL (1) from so much of an order of the Supreme Court at Special Term as denied plaintiffs' motion for a preliminary injunction and granted defendants' cross motion for summary judgment awarding declaratory judgment, as demanded in the counterclaim, that certain acts amendatory of the Alcoholic Beverage Control Law are constitutional and otherwise valid, and (2) from the judgment entered upon said order. (Opinion: --- Misc 2d ----) MOTION for a temporary restraining order.

The action is brought by distillers, importers and wholesalers of liquor sold in New York for judgment (1) declaring that the provisions of section 9 of chapter 531 of the Laws of 1964, amending subdivision 3 of section 101-b of the Alcoholic Beverage Control Law, and certain of the provisions of section 7 of said chapter, amending paragraph (a) of subdivision 3 of section 101-b of the same act, are invalid as violative of the commerce and

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supremacy clauses of the Constitution of the United States (U. S. Const., art. 1, § 8, cl. 3; art. VI, cl. 2) and as violative, also, of the due process and equal protection clauses of the Constitutions of the United States and the State of New York (U. S. Const., 14th Amdt., § 2; N. Y. Const., art. I, §§ 6, 11), and (2) enjoining the imposition of penalties for failure of compliance with such allegedly invalid provisions.

Appellants' many-pronged attack is directed principally to the provisions requiring, in substance, that each distiller and wholesaler offer New York purchasers in respect of each brand sold by him a price no higher than the lowest price at which such item was sold elsewhere in the United States, as shown by schedules and affirmations required to be filed by him.

The case thus involves important constitutional questions respecting legislation of social consequence and of wide application; it is well and thoroughly briefed and is presented upon an adequate record; it will, most likely, be further reviewed; and under all these circumstances we deem it the function of this intermediate appellate court to reach its determination promptly and to state it succinctly and without elaboration.

The legislative policy sought to be effectuated by the amendments in dispute was declared to be, among other things, to foster price competition, to eliminate discrimination against New York consumers and "to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination", price discrimination and favoritism being found "contrary to the best interests and welfare of the people of this state". (L. 1964, ch. 531, § 8.)

Neither in the record nor in appellants' argument do we find a substantial basis for the assertion that equal

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protection has been denied. In the light of the legislative history and studies and, so far as applicable, the studies and reports of the Moreland Act Commission, and upon our finding that the strong supportive presumptions have not been overcome, we conclude that the enactment constitutes a valid exercise of the police power and effects no deprivation of due process.

Appellants argue forcefully that the maximum price provisions of the amendments contravene the Robinson-Patman Act (U. S. Code, tit. 15, §§ 13 *et seq.*) and the Sherman Act (U. S. Code, tit. 15, §§ 1-7), and thus are violative of the supremacy clause and that the challenged amendments offend the commerce clause as well. The complete answer is, we believe, that the legislation lies well within the area of liquor traffic regulation in which, under the Federal Constitution, effective control may be exercised by the States. (U. S. Const., 21st Amdt., § 2; *State Bd. of Equalization v. Young's Market Co.*, 299 U. S. 59; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U. S. 391; *Finch & Co. v. McKittrick*, 305 U. S. 395). The later authorities, upon which appellants principally rely (see, e.g., *United States v. Frankfort Distilleries*, 324 U. S. 293; *Hostetter v. Idlewild Bon Voyage Liq. Corp.*, 377 U. S. 324; *Department of Revenue v. James B. Beam Distilling Co.*, 377 U. S. 341), seem readily distinguishable from the older cases, above cited, and from the case before us. In *Frankfort* was involved a criminal prosecution, which the Court held (p. 299) was not barred by the 21st Amendment, which "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries"; and the Court was careful to point out (p. 299) that the Sherman Act "is not being enforced in this case in such manner as to conflict with the law of

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Colorado." Unlike the case before us, neither *Idlewild* nor *Beam* concerned an attempt by a State to exert internal control, within the ambit of the 21st Amendment, but, rather, involved taxing procedures long recognized as illegal.

Appellants' remaining contentions seem to us unsubstantial and do not require discussion.

Judgment affirmed, with costs. Motion for temporary restraining order denied, without costs. Application for permission to appeal to the Court of Appeals granted, without costs.

GIBSON, P. J., HERLIHY, TAYLOR, AULISI and HAMM, JJ., concur.

## APPENDIX C

SUPREME COURT OF THE STATE  
OF NEW YORK

## COUNTY OF ALBANY

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JOSEPH E. SEAGRAM & SONS INC., THE HOUSE OF SEAGRAM, INC., STITZEL-WELLER DISTILLERY, INC., THE PADDINGTON CORPORATION, HIRAM WALKER INCORPORATED, GOODERHAM & WORTS LIMITED, JAS. BARCLAY & Co., LIMITED, W. A. TAYLOR & COMPANY, HIRAM WALKER DISTRIBUTORS, INC., THE AMERICAN DISTILLING COMPANY, McCORMICK DISTILLING COMPANY, THE FLEISCHMANN DISTILLING CORPORATION, MR. BOSTON DISTILLER INC., THE VIKING DISTILLERY, INC., JAMES B. BEAM DISTILLING COMPANY, JAMES B. BEAM IMPORT CORPORATION, SCHENLEY INDUSTRIES, INC., AFFILIATED DISTILLERS BRANDS CORP., KNICKERBOCKER LIQUORS CORP., BARTON DISTILLING COMPANY, BARTON DISTILLERS IMPORT CORPORATION, JULIUS WILE SONS & COMPANY, INC., BACARDI IMPORTS, INC., AUSTIN NICHOLS & COMPANY, INC., CANADA DRY CORPORATION, BEUBLEIN INC., McKESSON & ROBBINS, INC., NATIONAL DISTILLERS AND CHEMICAL CORPORATION, PUBLICKEE DISTILLERS PRODUCTS, INC., WAYNE LIQUOR CORP., BROWN-FORMAN DISTILLERS CORPORATION, GLENMORE DISTILLERIES COMPANY, A. SMITH BOWMAN DISTILLERY INC., "21" BRANDS, INC., STAR HILL DISTILLING COMPANY, SCHIEFFELIN & COMPANY, ALPINE WINE & LIQUOR CORP., BEN PERLOW LIQUOR CORP., BISON LIQUOR Co., INC., BLUE CREST WINE AND SPIRIT CORP., BONNY DISTRIBUTING Co., INC., CAPITAL DISTRIBUTORS CORP., CARDINAL DISTRIBUTORS INC., COLONY LIQUOR DISTRIBUTIONS, INC., DISTILLED

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BRANDS, INC., EBER BROS. WINE & LIQUOR CORP., ELMIRA  
TOBACCO CO., INC., EMPIRE LIQUOR CORP., GRAVES &  
RODGERS, INC., M. LICHTMAN & CO., INC., MAJOR LIQUOR  
DISTRIBUTORS INC., MONARCH LIQUOR CORP., MULLEN &  
GUNN, INC., PEERLESS IMPORTERS CORP., RAMAPO WINE  
& LIQUOR CORPORATION, ROCHESTER LIQUOR CORPORATION,  
RODGERS LIQUOR CO., INC., S & K WINE & LIQUOR CORP.,  
STANDARD FOOD PRODUCTS CORP., STANDARD WINE &  
LIQUOR CO., INC., STAR INDUSTRIES INC., UNIVERSAL  
LIQUOR CORP.,

*Plaintiffs,*

*against*

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM  
H. MORGAN, BENJAMIN H. BLACOM, ROBERT E. DOYLE,  
constituting the State Liquor Authority and LOUIS J.  
LEFKOWITZ, Attorney General of the State of New York,

*Defendants.*

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Supreme Court, Albany County Special Term,

December 28, 1964

Calendar # 10-241

JUSTICE ELLIS J. STALEY, JR., presiding

**Appearances:**

LORD, DAY & LORD, Esqs.  
Attorneys for Plaintiffs  
25 Broadway  
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The Capitol  
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RUTH KESSLER TOCH  
Assistant Solicitor General

ROBERT HARRISON  
Assistant Attorney General  
*of Counsel.*

STALEY, JR., J.:

This is a motion for an order restraining the defendants pending the determination of the issues in this action from:

1. Requiring plaintiffs to comply in any manner with any part of section 9, ch. 531 of the Laws of 1964.

2. Requiring those plaintiffs who sell their brands of liquor to wholesalers located in other states as well as to wholesalers in the State of New York to file a schedule of prices at which such liquor is sold to wholesalers in states other than New York "irrespective of the place of sale or delivery" as required by section 7, ch. 531 of the Laws of 1964.

3. Requiring plaintiffs to include in their schedule of prices filed pursuant to section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by seller" as required by section 7, ch. 531 of the Laws of 1964.

A cross motion is made by the defendants for an order dismissing the complaint herein or, in the alternative, for judgment declaring section 9 of ch. 531 of the Laws of 1964 and section 7, subdv. 3(a) of ch. 531 of the Laws of

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1964 to be in all respects constitutional and valid. Section 7 and section 9, as herein referred to, in each instance shall mean section 7 and section 9 of ch. 531 of the Laws of 1964.

Section 9 added new paragraphs (d), (e), (f), (g), (h), (i), (j) and (k) to subdv. 3 of section 101-b of the Alcoholic Beverage Control Law. Section 7 enacted certain amendments to subdvs. 2, 3 and 4 of section 101-b and added new subdv. 6 to said section.

The provisions of section 7 require monthly schedules of brand owners', distillers' or manufacturers' bottle and case prices and discounts to wholesalers, as well as the net bottle and case price paid by the seller and of wholesalers' prices and discounts to retailers. The sale of liquor or wine to or by a wholesaler or retailer is prohibited unless the required schedules are filed and, in the case of a wholesaler, such prohibition applies irrespective of the place of sale or delivery. Schedules are not required to be filed for an item under a brand owned exclusively by one retailer and sold at retail within the state exclusively by such retailer.

Discrimination in price or discounts and the granting of discounts other than as provided in the section is declared to be unlawful. Penalties are also provided for making any sale or purchase in violation of the provisions of the section or for making a false statement in any schedule or for failing or refusing to comply with the provisions of the section.

In essence section 9 requires that, in addition to the schedules required by section 7, there must be filed an affirmation by the brand owner, or by the wholesaler designated as agent for the purpose of filing the schedule if the owner of the brand is not licensed by the liquor authority that the bottle and case price of liquor to wholesalers set forth in the schedule is no higher than the

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lowest price at which such item was sold by such brand owner or such wholesaler or any related person to any wholesaler anywhere in any other State of the United States or in the District of Columbia or to any state which owns and operates retail liquor stores in the month immediately preceding the month in which the schedule is filed. A similar affirmation is required concerning sale to retailers. In the event an affirmation is not filed with respect to an item of liquor the schedule for which the affirmation is required is deemed invalid and such item may not be sold to or purchased by a wholesaler during the period covered by the schedule. Provision is made for determining the lowest price for which any item was sold elsewhere and the making of a false statement in an affirmation is declared to be a misdemeanor.

The intent of the Legislature in making these amendments is set forth in section 8 which provides as follows:

"In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that

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the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination."

The first two causes of action of the complaint seek a declaratory judgment determining (1) that section 9 is unconstitutional and void in that it deprives the plaintiffs named in the first cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's police power; is inconsistent with the declared policy of the Alcoholic Beverage Control Law as expressed in sections 2 and 101-b(1) of that law; it will not serve to cure the possibility of monopolistic and anti-competitive practices; it contravenes the terms and policy of the Sherman Act, 15 U.S.C. sections 1-7; it is in direct conflict with the Robinson-Patman Act, 15 U.S.C., sections 13(a), 13(b) and 21(a); it violates the Constitution of the United States by interfering with commerce among the states; it violates the Constitution of the State of New York and the Constitution of the United States in that it is discriminatory; (2) that section 7, Subdv. 3(a) is unconstitutional and void in that it violates the Constitution of the United States by interfering with commerce among the states and with foreign commerce and deprive the plaintiffs of property without due process of law; (3) that section 9(f) violates the Constitution of the State of New York and the Constitution of the United States in that it deprives the plaintiff named in the second cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's police power; it is likely to cause unwitting violations of the laws of New

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York and of other states and of the federal anti-trust laws; it is vague and indefinite.

The third and fourth causes of action of the complaint seek an injunction enjoining and restraining the defendants and their successors from imposing any sanctions or penalties for failure to submit the affirmations and verifications required by section 9 and for failure to file the prices and schedules required to be filed by section 7 on the ground that said sections are unconstitutional and void.

The cross motion by the defendants for judgment declaring section 9 and section 7, subdv. 3(a) to be, in all respects, constitutional and valid is, in effect, a motion for summary judgment.

In weighing a challenge of unconstitutionality of a statute the Courts observe the legal principles; that a legislative enactment carries with it an exceedingly strong presumption of constitutionality; that every intendment is in favor of the statute's validity; that the heavy burden of demonstrating unconstitutionality beyond a reasonable doubt rests upon the one who attacks a statute as unconstitutional and that only as a last unavoidable result do Courts strike down a legislative enactment as unconstitutional. (*I.L.F.Y. Co. v. Temporary State Rent Comm.*, 10 N. Y. 2d 263; *Wiggins v. Town of Somers*, 4 N. Y. 2d 215; *Lincoln Bldg. Assoc. v. Barr*, 1 N. Y. 2d 413; *New York State Thruway Authority v. Ashley Motor Court*, 12 A D 2d 223, *affd.* 10 N. Y. 2d 151; *Matter of Roosevelt Raceway Inc. v. Monaghan*, 9 N. Y. 2d 293; *Matter of Ahern v. South Buffalo Ry. Co.*, 303 N. Y. 545, *affd.* 344 U. S. 367; *Martin v. State Liquor Authority*, 43 Misc. 2d 682, *affd.* 15 N. Y. 2d 707.)

The judgment of the Courts will not be substituted for that of the Legislature to determine whether the legislation will accomplish the desired end or can be effectively administered.

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Courts no longer employ the due process clause of the Constitution to invalidate State Laws regulatory of business and industrial conditions merely because such laws are deemed unwise or improvident. (*Williamson v. Lee Optical Co.*, 348 U. S. 483; *Gail Turner Nurses Agency, Inc. v. State of New York*, 17 Misc. 2d 273.)

Nor will the Court sit as a superlegislature to weigh the wisdom of each enactment brought before it, or decide whether policy which it expresses offends the welfare of a particular group. (*Day-Brite Light, Inc. v. Missouri*, 342 U. S. 421; *Gail Turner Agency v. State of New York*, *supra*.)

Nor are legislative enactments rendered invalid as a denial of due process or equal protection under the law because they impose financial hardship, result in reduced income or make it impossible for some to continue in a particular business. (*California Automobile Assn. v. Maloney*, 341 U. S. 105; *Breard v. Alexandria*, 341 U. S. 622; *Day-Brite Light, Inc. v. Missouri*, *supra*; *Gail Turner Agency v. State of New York*, *supra*.)

The Legislature is also presumed to have investigated the subject matter of the statute and found facts to support the legislation. (*Martin v. State Liquor Authority*, *supra*.) In this instance the Legislature, in addition had before it, when it enacted ch. 531 of the Laws of 1964, the Study Papers and Reports of the Moreland Commission. Being an enactment under the police power of the state, the strongest presumption of validity attaches to ch. 531 of the Laws of 1964 and the fact that it causes or might cause an economic hardship to those whom it affects is no argument against its constitutional validity, if it is an otherwise valid exercise of the state's police power. (*N. H. Lyons & Co., Inc. v. Corsi*, 3 N. Y. 2d 60.)

Plaintiffs attack ch. 531 on the basis that it deprives them of liberty and property without due process of law in

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violation of the Constitutions of the State of New York and of the United States is contained in paragraphs 53, 90 and 91 of their complaint. In essence these paragraphs allege economic hardships, possible reduced profit margins, expenditures for new equipment, possible difficulty in increasing prices and difficulty in competing in other States. These allegations, even if proven, have no bearing on the constitutionality of the statute. (*California Automobile Assn. v. Maloney, supra; Breard v. Alexandria, supra; Day-Brite Light, Inc. v. Missouri, supra; Gail Turner Agency v. State, supra.*)

Paragraphs 54, 90 and 94 of the plaintiffs' complaint allege that section 9 is an arbitrary, capricious and unreasonable exercise of the state's police power in that the term related person as defined in section 9 is vague; plaintiffs have no power to compel related persons to furnish them with information; price differentials are limited to state gallonage taxes or fees; it is impossible for plaintiffs to determine in any given month the prices at which brands sold by them in New York are sold to wholesalers and/or retailers throughout the United States and the District of Columbia; it is impossible for plaintiffs to determine what is meant by inducements of any kind whatsoever.

The choice of measures is for the Legislature who are presumed to have investigated the subject and to have acted with reason not from caprice. "Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice,



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prefer some other measure as more fit and appropriate." (*People v. Griswold*, 213 N. Y. 92.)

The provisions of ch. 531 requiring filing price schedules and affirmations is not, in and of itself either arbitrary or unreasonable. Such filings are certainly appropriate to the purpose intended of preventing consumers in New York State from being discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states. The fact that the plaintiffs might find it difficult to obtain the required information or are limited by the act in the price differentials allowed, does not make the act arbitrary, capricious and unreasonable.

Plaintiffs' allegations concerning the vagueness of the terms "related person" and "inducements of any kind whatever" are equally without merit. Subdivision 4 of section 7 provides that "The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section." The section referred to is section 101-b of the Alcoholic Beverage Control Law.

The Legislature may and in many cases has enacted statutes in broad outline, leaving to administrative officials enforcing them the duty of arranging the details. (*Matter of National Surety Co.*, 239 App. Div. 490, *affd.* 264 N. Y. 473; *Matter of People [International Workers Order]* 199 Misc. 941, *affd.* 280 App. Div. 517, *affd.* 305 N. Y. 258; *Martin v. State Liquor Authority*, *supra.*) The Legislature often delegates to an executive officer the power to determine facts and conditions upon which the operation of a statute depends. This delegation of power relates to the execution of the law rather than to the making of the law. There is no valid objection to such a delegation of power. (*Tropp v. Knickerbocker Village, Inc.*, 205 Misc. 200, *affd.* 284 App. Div. 935; *Martin v. State Liquor Authority*, *supra.*)

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Plaintiffs' contentions that section 9 is inconsistent with the declared policy of the Alcoholic Beverage Control Law to promote temperance and that section 9 will not serve to cure the possibility of monopolistic and anti-competitive practices at which it is directed are equally insufficient to prove invalidity of the statute.

Paragraphs 57, 58 and 59 of the plaintiffs' complaint consist of allegations that section 9 contravenes the terms and policy of the Sherman Act, 15 U.S.C. sections 1 through 7 and is in direct conflict with the Robinson-Patman Act, 15 U.S.C., sections 13(a), 13(b) and 21(a) and, therefore, must yield to the supremacy of such laws as required by Article VI of the Constitution of the United States.

Paragraph 60 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the United States by interfering with commerce among the states.

There is no doubt that under the twenty-first amendment of the Constitution of the United States that the State of New York may not only regulate, but may completely prohibit the importation of some or all intoxicants destined for use or consumption of intoxicants within the state. (*California v. Washington*, 358 U. S. 64; *Department of Revenue v. James B. Beam Distilling Co.*, 377 U. S. 341; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324.)

The Alcoholic Beverage Control Law of the State of New York of alcoholic beverages. (Alcoholic Beverage Control Law, section 2.) Any effect which it has on interstate commerce is entirely co-incidental. The regulation and control of the sale and distribution of alcoholic beverages is a matter of local concern and the mere fact that such regulations have or may have some repercussions upon the activities of a business which operates nation-

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wide does not invalidate the state action, particularly where the subject of the action is within the police power of the state. (*Osborn v. Ozlin*, 310 U. S. 53; *Southern Pacific Co. v. Arizona*, 325 U. S. 761; *Watson v. Employers Liability Corp.*, 348 U. S. 66.)

On the other hand the commerce clause of the United States Constitution, the Sherman Act and the Robinson-Patman Act are all concerned with interstate commerce as distinguished from intrastate commerce. Since the purpose of the Alcoholic Beverage Control Law is to regulate and control the intrastate sale and distribution of alcoholic beverages, it does not come within the realm of the commerce clause of the United States Constitution nor of the Sherman Act or of the Robinson-Patman Act.

Paragraph 61 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the State of New York by discriminatingly imposing maximum price limitations upon sales made by persons dealing in liquor sold under "private labels" and sales made by vintners and wholesalers of wine.

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*Tigner v. Texas*, 310 U. S. 141.) The fact that the Legislature omitted certain ones who might have been included in the statute, does not render it unconstitutional. (*New York Rapid Transit Corp. v. City of New York*, 275 N. Y. 258; *People v. Charles Schweinler Press*, 214 N. Y. 395; *National Psychological Assoc. v. University of State of New York*, 8 N. Y. 2d 197.)

"So long as there is some real difference in the situation, interests and capacity of different classes of citizens, this may be the basis of legislative classification which has a real and reasonable relationship to the difference which thus exists." (*People v. Klinck Packing Co.*, 214 N. Y. 121.)

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The Legislature is also presumed to have investigated the subject matter of the legislation and based upon said investigation determined that a different classification should exist for brand owners, private brands and vintners.

Paragraph 63 of the plaintiffs' complaint consists of an allegation that paragraph 3(a) of section 7 violates the Constitution of the United States by requiring schedules for sales "irrespective of the place of sale or delivery" thereby interfering with commerce among the states and with foreign commerce and that the requirement of such schedules to contain the "net bottle and case price paid by the seller" deprives plaintiffs of property without due process of law and is an arbitrary, capricious and unreasonable exercise of the state's police power.

The fallacy of this allegation is in the fact that the plaintiffs fail to take into consideration the purpose of section 7 as is set forth in subdv. (1) thereof and also fail to take into consideration the saving clause or provision in subdv. 3(a).

Subdivision one provides: "It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages \* \* \*." This language sets forth words of limitation and limits the applicability of the law to regulation and control within the state.

Subdivision 3(a) which contains the words "irrespective of the place of sale and delivery" also contains a savings clause which provides as follows: "Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter."

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Thus a licensee may purchase liquor for reasons not inconsistent with the purpose of this chapter upon obtaining prior written permission of the authority. It goes without saying that a purchase or sale to a wholesaler for sale or distribution in interstate or foreign commerce would be a purpose not inconsistent with this chapter. The requirement that a licensee obtain prior permission to make such purchases or sales is not such a burden on interstate commerce as to render it invalid under the Commerce Clause of the United States Constitution, particularly when it is taken into consideration; that the term "wholesaler" means licensed wholesaler (section 3, subdv. 35 of the Alcoholic Beverage Control Law); that section 62 of said law permits a licensed wholesaler "to sell and deliver to persons outside the state pursuant to the laws of the place of sale and delivery; that the state has the power to require its licensees to make all reports which it deems necessary to be made by any licensee (section 17, subdv. 8 of the Alcoholic Beverage Control Law; amendment 21, United States Constitution) and that the state and the Liquor Authority have the right and power to refuse to issue any license or permit provided for in the Alcoholic Beverage Control Law.

Plaintiffs' allegation in this paragraph of their complaint of a violation of due process stands in no better position than their similar allegations in paragraphs 54, 90 and 94 of their complaint. The allegation that the requirement that "net bottle and case price paid by the seller" in no way serves to carry out the policy of the Alcoholic Beverage Control Law is a mere conclusion not supported by fact.

Further, the information would appear to have some value in determining whether the fundamental principles of price competition prevails in the industry and in determining whether unjustifiable prices are being charged to

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consumer in the state. Thus, this part of the legislation appears to be adapted to the end intended by section 8 of ch. 531. The Court must, therefore, give it effect. (*People v. Griswold, supra.*)

It, thus, clearly appears that the plaintiffs have failed to sustain the burden of demonstrating the unconstitutionality beyond a reasonable doubt. It is, therefore, the opinion of the Court that the sections in question are constitutional. There being no clear question of fact presented here, declaratory judgment may be appropriately directed. (*Martin v. State Liquor Authority, supra.*)

The motion to dismiss the complaint is denied and judgment is directed in favor of the defendant declaring section 9 and section 7 subdv. 3(a) of ch. 531 of the Laws of 1964 to be, in all respects, constitutional and valid.

Plaintiffs' application for a preliminary injunction is denied.

Attorney for defendants to submit order.

All papers to the attorney for defendants for filing upon entry of the order herein.

**APPENDIX D**

**COURT OF APPEALS**

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 9th day of July in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,  
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

Remittitur July 9, 1965

3.

No. 249.

65

JOSEPH E. SEAGRAM & SONS, INC., & ors.,

*Appellants,*

*vs.*

DONALD S. HOSTETTER, Chairman, & ors., constituting the  
State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney  
General of the State of New York,

*Respondents.*

BE IT REMEMBERED, That on the 27th day of May in the year of our Lord one thousand nine hundred and sixty-five, Joseph E. Seagram & Sons, Inc., & ors., the appellants in this cause, came here unto the Court of Appeals, by Lord, Day & Lord, their attorneys, and filed in the said



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Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Donald S. Hostetter, Chairman, & ors., constituting the State Liquor Authority, and Louis J. Lefkowitz, Attorney General of the State of New York, the respondents in said cause, afterwards appeared in said Court of Appeals by Louis J. Lefkowitz, Attorney General, who also appeared pro se.

Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Thomas F. Daly of counsel for the appellants, and by Ruth Kessler Toch, of counsel for the respondents, brief filed by amici curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

s/ RAYMOND J. CANNON  
Clerk of the Court of Appeals  
of the State of New York.

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COURT OF APPEALS, CLERK'S OFFICE, }  
Albany, July 9, 1965. }

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals with the papers originally filed therein, attached thereto.

(SEAL)

s/ RAYMOND J. CANNON  
Clerk.

## APPENDIX E

## LAWS OF NEW YORK.—By Authority

## CHAPTER 531

AN ACT to amend the alcoholic beverage control law, in relation to authorizing the issuance of special licenses to sell liquor at retail for on-premises consumption, prohibiting price discrimination in sales to wholesalers and retailers, prohibiting liquor sales below cost at retail for off-premises consumption, regulating the minimum consumer resale price of wine, repealing section one hundred one-c of such law relating to minimum consumer resale prices, repealing subdivisions four and four-a of section one hundred five of such law relating to required minimum distances between premises licensed to sell at retail for off-premises consumption and making an appropriation therefor

Became a law April 16, 1964, with the approval of the Governor. Passed, on message pursuant to article IV, section 3 and message of necessity, pursuant to article III, section 14 of the Constitution, by a majority vote, three-fifths being present

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section fifty-five of the alcoholic beverage control law, as last amended by chapter nine hundred five of the laws of nineteen hundred sixty-one, is hereby amended to read as follows:

3. No such license shall be issued, however, to any person for any premises other than *premises for which a license may be issued under section sixty-four or sixty-four-a of this chapter* or a hotel [ , club, vessel, car, or such ] or premises which are kept, used, maintained, advertised or held out to the public to be a place where food is prepared and served for consumption on the premises in such quantities as to satisfy the liquor authority that the sale of beer intended is incidental to and not the prime source of revenue from the operation of such premises. The foregoing provisions of this subdivision shall not apply to any prem-

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Those portions of Section 7 of Ch. 531 at issue in the instant case are underscored. See pp. A-45, A-46. Section 9 of Ch. 531 is set forth at A-49 through A-52.

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ises located at, in, or on the area leased by the city of New York to New York World's Fair 1964 Corporation pursuant to the provisions of chapter four hundred twenty-eight of the laws of nineteen hundred sixty, as amended by a chapter of the laws of nineteen hundred sixty-one, during the term or duration of such lease. Such license may also include such suitable space outside of the licensed premises and adjoining it as may be approved by the liquor authority.

§ 2. Section sixty of such law is hereby amended to read as follows:

§ 60. Kinds of licenses. The following kinds of licenses may be issued for the manufacture and sale of liquor, alcohol and spirits, to wit:

1. Distiller's license, class A.
2. Distiller's license, class B.
- 2-a. Distiller's license, class C.
3. Wholesaler's license.
4. License to sell liquor at retail for consumption off the premises.
5. License to sell liquor at retail for consumption on the premises.
6. *Special license to sell liquor at retail for consumption on the premises.*

§ 3. Subdivision one of section sixty-four of such law is hereby amended to read as follows:

1. **[Any]** *Notwithstanding the provisions of subdivision two of section seventeen of this chapter, any person may make an application to the appropriate board for a license to sell liquor at retail to be consumed on the premises where sold, and such licenses shall be issued to all applicants except for good cause shown.*

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§ 4. Such law is hereby amended by adding thereto a new section, to be section sixty-four-a, to read as follows:

§ 64-a. *Special license to sell liquor at retail for consumption on the premises.* 1. On or before March first, nineteen hundred sixty-five, any license issued under section sixty-four of this article may be converted into a special on-premises license under this section upon the granting of a request for conversion filed with the liquor authority by the holder of said license. Such a request shall be granted by the authority except for good cause shown. The granting of such a request shall constitute conversion of said license into a special on-premises license subject to the provisions of this chapter applicable to special on-premises licenses issued under this section.

2. On or after October first, nineteen hundred sixty-four, any person may make an application to the appropriate board for a special license to sell liquor at retail to be consumed on the premises where sold.

3. Such application shall be in such form and shall contain such information as shall be required by the rules of the liquor authority and shall be accompanied by a certified check, bank-officers' check or draft, or money order in the amount required by this article for such license.

4. Section fifty-four shall control so far as applicable the procedure in connection with such application.

5. Such special license shall in form and in substance be a license to the person specifically licensed to sell liquor at retail to be consumed on the premises specifically licensed. Such license shall also be deemed to include a license to sell wine and beer at retail to be consumed under the same terms and conditions, without the payment of any additional fee.

6. No special on-premises license shall be granted except for premises in which the principal business shall be

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(a) the sale of food or beverages at retail for consumption on the premises or (b) the operation of a legitimate theatre or such other lawful adult entertainment or recreational facility as the liquor authority, giving due regard to the convenience of the public and the strict avoidance of sales prohibited by this chapter, shall by regulation classify for eligibility. Nothing contained in this subdivision shall be deemed to authorize the issuance of a license to a motion picture theatre.

7. No special on-premises license shall be granted for any premises which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a school, church, synagogue or other place of worship; the measurements to be taken in a straight line from the center of the nearest entrance of such school, church, synagogue or other place of worship to the center of the nearest entrance of the premises to be licensed; except that no license shall be denied to any premises at which a license under this chapter has been in existence continuously from a date prior to the date when a building on the same street or avenue and within two hundred feet of said premises has been occupied exclusively as a school, church, synagogue or other place of worship.

8. Every special on-premises licensee shall regularly keep food available for sale to its customers for consumption on the premises. The availability of sandwiches, soups or other foods, whether fresh, processed, pre-cooked or frozen, shall be deemed compliance with this requirement. The licensed premises shall comply at all times with all the regulations of the local department of health. Nothing contained in this subdivision, however, shall be construed to require that any food be sold or purchased with any liquor, nor shall any rule, regulation or standard be promulgated or enforced requiring that the sale of food be substantial or

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*that the receipts of the business other than from the sale of liquor equal any set percentage of total receipts from sales made therein.*

*9. The liquor authority may make such rules as it deems necessary to carry out the provisions of this section.*

§ 5. Subdivision four of section sixty-six of such law, as last amended by chapter two hundred four of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

4. The annual fee for a license to sell liquor at retail to be consumed on the premises where sold shall be fifteen hundred dollars in the counties of New York, Kings, Bronx and Queens; ten hundred dollars in the county of Richmond and in cities having a population of more than one hundred thousand and less than one million; seven hundred fifty dollars in cities having a population of more than fifty thousand and less than one hundred thousand; and the sum of five hundred dollars elsewhere; except that the license fees for catering establishments shall be two-thirds and for clubs, except luncheon clubs and golf clubs, shall be one-half the license fee specified herein. The annual fees for luncheon clubs shall be three hundred seventy-five dollars, and for golf clubs in the counties of New York, Kings, Bronx, Queens, Nassau, Richmond and Westchester, two hundred fifty dollars, and elsewhere one hundred eighty-seven dollars and fifty cents. *The annual fee for a special license to sell liquor at retail to be consumed on the premises where sold shall be seventeen hundred dollars in the counties of New York, Kings, Bronx and Queens; twelve hundred dollars in the county of Richmond and in cities having a population of more than one hundred thousand and less than one million; nine hundred fifty dollars in cities having a population of more than fifty thousand and less than one hundred thousand; and the sum of seven hundred*



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*dollars elsewhere. Provided, however, that where any premises for which a license is issued pursuant to section sixty-four or sixty-four-a of this article remain [a hotel, restaurant or club remains] open only within the period commencing April first and ending October thirty-first of any one year, the liquor authority may, in its discretion, grant to the person owning or operating such premises [hotel, restaurant or club] a summer license effective only for such period of time, for which a license fee shall be paid to be pro-rated for the period for which such license is effective, at the rate provided for in the city, town or village in which such [hotel, restaurant or club is] premises are located, except that no such license fee shall be less than one-half of the regular annual license fee; provided further that where the premises to be licensed [is] are a race track or a golf course, the period of such summer license may commence March first and end November thirtieth.*

Where a hotel, restaurant, club, golf course or race track is open prior to April first and/or subsequent to October thirty-first by reason of the issuance of a caterer's permit or permits issued by the authority, such fact alone shall not affect the eligibility of the premises or the person owing or operating such hotel, restaurant, club, golf course or race track for a summer license.

§ 6. Section ninety-nine-c of such law, as amended by chapter six hundred fifteen of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§ 99-c. *Special permit authorizing sale on credit.* Notwithstanding any other provision of this chapter to the contrary, any person licensed to sell alcoholic beverages for consumption on the premises pursuant to *section sixty-four of this chapter*, may apply to the liquor authority for a special permit authorizing such licensee to sell alcoholic

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beverages for consumption on the premises on credit, provided such sale is made only as an incident to the sale of food to be consumed on the premises.

The annual fee for such special permit, for any year commencing on or after March first, nineteen hundred forty-eight, and which shall run concurrently with the annual term of the license for on-premises consumption, shall be one thousand dollars in the counties of New York, Kings, Bronx, Queens and Richmond; and eight hundred dollars elsewhere within the state; provided, however, that where a hotel or restaurant remains open only within the period commencing April first and ending October thirty-first of any one year, the liquor authority may, in its discretion, grant to the hotel or restaurant licensee such special permit effective only for such period of time for which the special permit fee to be paid shall be prorated for the period for which such special permit is effective, at the rate provided for in the city, town or village in which such hotel or restaurant is located, except that no such special permit fee shall be less than one-half of the regular special permit fee.

Where application for such special permit under this section is made after the commencement of the license year, the special permit fee therefor shall, for the balance of the license year, be in proportion as the remainder of such year shall bear to the whole year, except that it shall in no case be for less than one-half of such year.

The liquor authority may, in its discretion, and upon such terms and conditions as it may prescribe, issue such a special permit.

§ 7. Section one hundred one-b of such law, as added by chapter eight hundred ninety-nine of the laws of nineteen hundred forty-two, subdivision four thereof having been amended by chapter five hundred fifty-one of the laws of

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nineteen hundred forty-eight, is hereby amended to read as follows:

§ 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund. 1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person [privileged to sell] *who sells* liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality[.]; (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement *of any kind whatsoever*, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of

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wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold [within the state] *to or purchased by* a wholesaler, [or retailer] *irrespective of the place of sale or delivery*, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. [(b) The] *Such* schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, *the number of bottles contained in each case*, the bottle and case price to wholesalers, the *net bottle and case price* [to retailers] *paid by the seller*, [the number of bottles contained in each case,] which prices, *in each instance*, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. *Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.* [(c) The] *Such* schedule [containing the bottle and case price to wholesalers] shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

(b) *No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in*

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effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. [(d) The] Such schedule [containing the bottle and case price to retailers] shall be filed by each manufacturer [and wholesaler who sell brands of liquors or wines] selling such brand to retailers and by each wholesaler selling such brand to retailers.

[(e)] (c) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state *exclusively* by such retailer.

4. Each such schedule shall be filed on or before the tenth day of each month on a date to be fixed by the authority, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licensees. Within three

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business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. [No brand of liquor or wine shall be sold except at the price then in effect unless written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.] All schedules filed shall be subject to public inspection, from the time that they are required to be made available for inspection by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section.

5. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, on or before the tenth day after this act becomes a law, there shall be paid to the liquor authority by each manufacturer and wholesaler licensed under this chapter to sell to retailers liquors and/or wines, a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for each such licensee. A like sum shall be paid by each person hereafter applying for any such license or the renewal of any such license, and such sum shall accompany the application and the license fee prescribed by this chapter for such license or renewal as the case may be. In the event that any other law requires the payment of a fee by any such licensee or applicant as set forth in this section

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for schedule listing, then and in such event the total fee imposed by this section and such other law or laws on each such licensee shall not exceed in the aggregate a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for such license.

*6. The authority may revoke, cancel or suspend any license issued pursuant to this chapter, and may recover (as provided in section one hundred twelve of this chapter) the penal sum of the bond filed by a licensee; or both, for any sale or purchase in violation of any of the provisions of this section or for making a false statement in any schedule filed pursuant to this section or for failing or refusing in any manner to comply with any of the provisions of this section.*

§ 8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anticompetitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination.



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§ 9. Subdivision three of section one hundred one-b of such law, as amended by section seven of this act, is hereby amended to add eight new paragraphs, to be paragraphs (d), (e), (f), (g), (h), (i), (j) and (k), to read as follows:

(d) *There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.*

(e) *There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to wholesalers set*

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*forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.*

*(f) There shall be filed in connection with and when filed shall be deemed part of any schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, or by a related person, an affirmation duly verified by such brand owner or such wholesaler designated as agent that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner of such wholesaler designated as agent, or any related person, to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (f), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands.*

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(g) *There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month preceding the month in which such schedule is filed.*

(h) *In the event an affirmation with respect to any item of liquor is not filed within the time provided by this section, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of liquor, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule.*

(i) *In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer, as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d), (e), (f) and (g) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this paragraph, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or*

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*the District of Columbia upon or based upon the gallon of liquor, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.*

*(j) Notwithstanding and in lieu of any other penalty provided in any other provisions of this chapter, any person who makes a false statement in any affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than ten thousand dollars or by imprisonment in a county jail or penitentiary for a term of not more than six months or by both such fine and imprisonment. Every affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be deemed to have been made in every county in this state in which the brand of liquor is offered for sale under the terms of said schedule. The attorney general or any district attorney may prosecute any person charged with the commission of a violation of this paragraph. In any such prosecution by the attorney general, he may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties in respect of any such proceeding which the district attorney would otherwise be authorized or required to exercise or perform, and in such prosecution the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney general or his deputy or assistant so attending.*

*(k) Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the liquor authority may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.*

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§ 10. Such law is hereby amended by adding thereto a new section, to be section one hundred one-bb, to read as follows:

§ 101-bb. *Prohibition against retail sales at less than cost.* 1. *It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of liquor for the purpose of fostering and promoting temperance in its consumption and respect for and obedience to the law. In order to eliminate retail sales of liquor at less than cost which unduly disrupt the orderly sale and distribution of liquor, it is hereby declared as the policy of the state that the sale of liquor should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.*

2. *No licensee authorized to sell liquor at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any item of liquor at a price which is less than cost. As used in this section, the term:*

(a) *"liquor" shall mean liquor bearing a brand or trade name, and of like age and quality, which is contained in a schedule filed with the authority pursuant to section one hundred one-b of this article, and*

(b) *"cost" shall mean the price of such item of liquor to retailers contained in the applicable schedule filed with the authority pursuant to section one hundred one-b of this article and which is in effect at the time such licensee sells, offers to sell, solicits an order for or advertises such liquor at retail. As used in this paragraph (b), the term "price" shall mean bottle price, before any discounts, contained in such schedule.*

3. *Nothing contained in this section, however, shall prevent such licensee from selling, offering to sell or soliciting an order for such liquor at a price less than cost, provided*

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*that prior written permission therefor is granted by the authority for good cause shown and for reasons not inconsistent with the purpose of this chapter and under such terms and conditions as the authority deems necessary.*

*4. The authority is hereby authorized to promulgate rules which are necessary*

*(a) to carry out the purpose of this section and to prevent its circumvention;*

*(b) to permit the sale of liquor which is damaged or deteriorated in quality, or the close-out of a brand for the purpose of discontinuing its sale, at a price which is less than cost and under such terms and conditions as are necessary to carry out the purposes of this section;*

*(c) to permit the sale whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee affected by this section or because of acts or circumstances beyond the control of such licensee, at a price which is less than cost and under such terms and conditions as are necessary to carry out the purposes of this section.*

*5. For the violation of any provision of this section or of any rule duly promulgated under this section, the authority may: for a first offense, suspend a license for a period not exceeding ten days; for a second offense, suspend a license for a period not exceeding thirty days; and for a third offense, suspend, cancel or revoke a license. In addition, for any such offense, the authority may recover, as provided in section one hundred twelve of this chapter, the penal sum of the bond filed by the licensee.*

*6. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, there shall be paid to the authority by each person hereafter applying for a license as manufacturer, wholesaler and retailer as hereinafter set forth, the following sums: distiller licensee or wholesale liquor licensee, sixty*

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dollars; retail liquor licensee for off-premises consumption, ten dollars. A like sum shall be paid by each person hereafter applying for the renewal of any such license, and such sums shall accompany the application and the license fee prescribed by this chapter for such license or renewal thereof, as the case may be. The fees prescribed by this subdivision shall not be pro-rated for any portion of the license year and shall have no refund value.

§ 11. Section one hundred one-c of such law, as added by chapter six hundred eighty-nine of the laws of nineteen hundred fifty, is hereby **repealed**.

§ 12. Such law is hereby amended by adding thereto a new section, to be section one hundred one-bbb, to read as follows:

§ 101-bbb. *Minimum consumer resale prices of wine.* 1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution of wine for the purpose of promoting the orderly sale and distribution thereof. It is hereby declared as the policy of the state that the sale of wine should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. No manufacturer or wholesaler of wine shall sell, offer for sale, solicit any order for or advertise any wine, the container of which bears a label stating the brand or the name of the owner or producer, unless a schedule of minimum consumer resale prices for each such brand of wine shall first have been filed with the liquor authority, and such schedule is then in effect, except that written permission therefor may be granted by the authority for good cause shown and for reasons not inconsistent with the purposes of this section and under such terms and conditions as the authority deems necessary.



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3. (a) Such schedule shall be filed by (1) the manufacturer or wholesaler who owns such brand, if licensed by the authority, or (2) a wholesaler, selling such brand, who is appointed as exclusive agent, in writing, by the brand owner for the purpose of filing such schedule, if the brand owner is not licensed by the authority, or (3) any wholesaler, with the approval of the authority, in the event that the owner of such brand does not file or is unable to file a schedule or designate an agent for such purpose.

(b) Such schedule shall be in writing duly verified, and filed in the number of copies and in the form required by the authority, and shall contain with respect to each brand, the brand or trade name, capacity of the container, nature of contents, age and proof where stated on the label, the minimum consumer resale price of a bottle and/or a case, but not a multiple of a bottle price or a case price or a fraction of a case price. Such prices shall be uniform throughout the state.

(c) The first schedule shall be filed on or before the tenth day of September, nineteen hundred sixty-four on a date to be fixed by the authority, and the prices therein set forth shall become effective on the first day of November, nineteen hundred sixty-four and shall remain in effect for the months of November and December, nineteen hundred sixty-four. Subsequent schedules shall be filed at the times and for the periods hereinafter set forth and shall be effective during the periods hereinafter set forth:

<i>Filing Date</i>	<i>Effective Dates</i>
November 1-10	January 1-February 28
January 1-10	March 1-April 30
March 1-10	May 1-June 30
May 1-10	July 1-August 31
July 1-10	September 1-October 31
September 1-10	November 1-December 31

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(d) *Provided, however, nothing contained herein shall require any manufacturer or wholesaler to file a schedule of minimum consumer resale prices for any brand of wine offered for sale or sold (1) to a retailer under a brand which is owned exclusively by such retailer and sold within the state exclusively by such retailer; (2) to a consumer or to a church, synagogue or religious organization under a brand which is owned exclusively by such manufacturer or wholesaler, if authorized to sell wine to such persons and such wine is sold exclusively to such persons; (3) to on-premises retailers under a brand which is owned exclusively by such manufacturer or wholesaler and is sold by such manufacturer or wholesaler exclusively to such retailers for consumption on the premises.*

4. *Within ten days after the filing of such schedules the authority shall make them or a composite thereof available for inspection by licensees. All schedules so filed shall be subject to public inspection, from the time that they are required to be made available for inspection to licensees. Each manufacturer and wholesaler shall retain in his licensed premises a copy of his filed schedules. The authority shall, as soon as practicable after the tenth day of the month in which such schedules are filed compile, publish and furnish to each manufacturer or wholesaler of wine and to each retailer authorized to sell wine for off-premises consumption, a list, to be designated "minimum consumer resale price list for wine". Such list as then in effect shall be conspicuously displayed within the interior of licensed premises where sales are made and where they can be readily inspected by consumers.*

5. *No licensee authorized to sell wine at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any wine at a price less than the minimum consumer resale price then in effect, unless written permis-*

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sion of the authority is granted for good cause shown and for reasons not inconsistent with the purposes of this section and under such terms and conditions as the authority deems necessary.

6. The authority is hereby authorized to promulgate rules which are necessary

(a) to carry out the purpose of this section and to prevent its circumvention by the offering or giving of any rebate, allowance, free goods, discount or any other thing or service of value;

(b) to permit the withdrawal of, an addition to, a deletion from, or an amendment of any schedule or a modification of prices therein, when not inconsistent with the purposes of this section, whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee affected by this section or because of acts or circumstances beyond the control of such licensee, and under such terms and conditions as are necessary to carry out the purposes of this section;

(c) to permit the sale at a price less than the minimum consumer resale price of wine which is damaged or deteriorated in quality, or the close-out of a brand for the purpose of discontinuing its sale, under such terms and conditions as are necessary to carry out the purposes of this section;

(d) to permit the sale by a retailer of a brand of wine for which a schedule of minimum consumer resale prices has not been and cannot be filed, whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee affected by this section or because of acts or circumstances beyond the control of such licensee, and under such terms and conditions as are necessary to carry out the purposes of this section.

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7. For the violation of any provision of this section or of any rule duly promulgated under this section, the authority may suspend, cancel or revoke a license as follows: for a first offense, not exceeding ten days suspension of license; for a second offense, not exceeding thirty days suspension of license; and for a third offense, the authority may suspend, cancel or revoke the license. In addition, for any such offense, the authority may recover, as provided in section one hundred twelve, the penal sum of the bond filed by the licensee.

8. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, there shall be paid to the authority by each person hereafter applying for a license as manufacturer, wholesaler and retailer as hereinafter set forth, the following sums: winery licensee or wholesale wine licensee, fifty dollars; retail wine licensee for off-premises consumption, ten dollars. A like sum shall be paid by each person hereafter applying for the renewal of any such license, and such sums shall accompany the application and the license fee prescribed by this chapter for such license or renewal thereof, as the case may be. The fees prescribed by this subdivision shall not be pro-rated for any portion of the license year and shall have no refund value.

§ 13. Subdivisions four and four-a of section one hundred five of such law, subdivision four having been amended by chapter five hundred twenty of the laws of nineteen hundred forty-seven, and subdivision four-a having been amended by chapter five hundred sixty-six of the laws of nineteen hundred forty-one, are hereby **repealed**.

§ 14. Nothing contained in section thirteen of this act shall be construed as impairing or affecting the power of the state liquor authority to determine, in accordance with

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other provisions of the alcoholic beverage control law, whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby.

§ 15. Subdivision nineteen of section one hundred five of such law, as added by chapter nine hundred twenty-seven of the laws of nineteen hundred fifty-eight, is hereby amended to read as follows:

19. No licensee authorized to sell beer *or liquor* at retail for consumption off the premises shall display any sign on or adjacent to the licensed premises, setting forth the price at which beer *or liquor*, or any brand thereof, is sold or offered for sale, or advertise such price in any other manner or by any other means, except in the interior of the licensed premises.

§ 16. Subdivisions four and nine of section one hundred six of such law, paragraph (d) of subdivision nine having last been renumbered and amended by chapter four hundred sixty-seven of the laws of nineteen hundred fifty-five, are hereby amended to read, respectively, as follows:

4. (a) No liquors and/or wines shall be sold or served in [such licensed] premises *licensed under section sixty-four or clause (a) of subdivision six of section sixty-four-a of this chapter*, except at tables where food may be served and except as provided by subdivision four of section one hundred.

(b) *No liquors and/or wines shall be sold or served in premises licensed under clause (b) of subdivision six of section sixty-four-a of this chapter, except at such times and upon such conditions and by the use of such facilities as the liquor authority, by regulation, may prescribe with*

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*due regard to the convenience of the public and the strict avoidance of sales prohibited by this chapter.*

9. No restaurant *and no premises* licensed to sell liquors and/or wines for on-premises consumption *under clause (a) of subdivision six of section sixty-four-a of this chapter* shall be permitted to have:

(a) Any screen, blind, curtain, article or thing covering any part of any window on said licensed premises, which prevents a clear and full view into the interior of said premises from the sidewalk at all times;

(b) Any swinging entrance door;

(c) Any box, stall, partition or any obstruction which prevents a full view of the entire room by every person present therein; and

(d) **[.]** Any opening or means of entrance or passageway for persons or things between the licensed premises and any other room or place in the building containing the licensed premises, or any adjoining or abutting premises, unless such licensed premises are in a building used as a hotel and serves as a dining room for guests of such hotel; or unless such licensed premises are in a building owned or operated by any county, town, city, village or public authority or agency, in a park or other similar place of public accommodation. All glass in any window or door on said licensed premises shall be clear and shall not be opaque, colored, stained or frosted.

§ 17. Paragraph (d) of subdivision three of section one hundred seven of such law is hereby amended to read as follows:

(d) Form of notice for on-premises license. Notice is hereby given that license (fill in beer, liquor or wine as the case may be, and license number) has been issued to the undersigned to sell (beer, liquor or wine, as the case may be)

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at retail in a (hotel, club, restaurant, vessel, [or] car, or other type of establishment, as the case may be) under the alcoholic beverage control law at (fill in street address, city, town or village and county in which licensed premises are located) for on-premises consumption.

(Name of licensee)

(Address of licensee)

§ 18. Paragraph (b) of subdivision four of section one hundred seven-a of such law, such subdivision having been added by chapter two hundred four of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

(b) An application for registration of a brand or trade name label shall be filed by (1) the owner of the brand or trade name if such owner is licensed by the authority, or (2) a wholesaler selling such brand who is appointed as exclusive agent, in writing, by the owner of the brand or trade name for the purpose of filing such application, if the owner of the brand or trade name is not licensed by the authority, or (3) any wholesaler, with the approval of the authority, in the event that the owner of the brand or trade name does not file or is unable to file such application or designate an agent for such purposes, or (4) any wholesaler, with the approval of the authority, in the event that the owner of the brand or trade name is a retailer who does not file such application, provided that the retailer shall consent to such filing by such wholesaler. Such retailer may revoke his consent at any time, upon written notice to the authority and to such wholesaler.

Unless otherwise permitted or required by the authority, the application for registration of a liquor or wine brand or trade name label filed pursuant to this section shall be filed by the same licensee filing schedules pursuant to sections one hundred one-b and one hundred [one-c] one-bbb of this chapter.



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Cordials and wines which differ only as to fluid content, age, or vintage year, as defined by such regulations, shall be considered the same brand; and those that differ as to type or class may be considered the same brand by the authority where consistent with the purposes of this section.

§ 19. Subdivision one of section one hundred forty-one of such law, as amended by chapter four hundred twenty-six of the laws of nineteen hundred thirty-nine, is hereby amended to read as follows:

1. Not less than forty-five days nor more than sixty days before the general election in the year nineteen hundred thirty-five in any town, and before any subsequent general election in the town at which the submission of the questions hereinafter stated is authorized by this article, a petition signed by electors of the town to a number amounting to twenty-five per centum of the votes cast in the town for governor at the then last preceding gubernatorial election, acknowledged by the signers or authenticated by witnesses as provided in the election law in respect of a designating petition, requesting the submission at such election to the electors of the town of the questions contained in either group A or group B, may be filed with the town clerk:

## GROUP A

Question 1. Selling alcoholic beverages to be consumed on the premises where sold. Shall any person be authorized to sell alcoholic beverages at retail to be consumed on [the] premises [where sold in (here insert the name of the town)] *licensed pursuant to the provisions of section sixty-four of this chapter?*

Question 2. *Selling alcoholic beverages to be consumed on the premises where sold. Shall any person be authorized to sell alcoholic beverages at retail to be consumed on*

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*premises licensed pursuant to the provisions of section sixty-four-a of this chapter?*

Question [2.] 3. Selling alcoholic beverages not to be consumed on the premises where sold. Shall any person be authorized to sell alcoholic beverages at retail not to be consumed on the premises where sold in (here insert the name of the town)?

Question [3.] 4. Selling alcoholic beverages by hotel keepers only. Shall any person be authorized to sell alcoholic beverages at retail to be consumed on the premises where sold but only in connection with the business of keeping a hotel (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?

Question [4.] 5. Selling alcoholic beverages by summer hotel keepers only. Shall any person be authorized to sell alcoholic beverages at retail to be consumed on the premises where sold but only in connection with the business of keeping a summer hotel within the period from May first to October thirty-first, in (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?

## GROUP B

Question 1. Selling liquor or wine to be consumed on the premises where sold. Shall any person be authorized to sell liquor or wine at retail to be consumed on [the] premises [where sold in (here insert the name of the town)] *licensed pursuant to the provisions of section sixty-four of this chapter?*

Question 2. *Selling liquor or wine to be consumed on the premises where sold. Shall any person be authorized to sell liquor or wine at retail to be consumed on premises licensed pursuant to the provisions of section sixty-four-a of this chapter?*

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Question [2.] 3. Selling liquor or wine not to be consumed on the premises where sold. Shall any person be authorized to sell liquor or wine at retail not to be consumed on the premises where sold in (here insert the name of the town)?

Question [3.] 4. Selling liquor or wine by hotel keepers only. Shall any person be authorized to sell liquor or wine at retail to be consumed on the premises where sold but only in connection with the business of keeping a hotel in (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?

Question [4.] 5. Selling liquor or wine by summer hotel keepers only. Shall any person be authorized to sell liquor or wine at retail to be consumed on the premises where sold but only in connection with the business of keeping a summer hotel within the period from May first to October thirty-first, in (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?

§ 20. If any provision of any section of this act or the application thereof to any person or circumstance shall be adjudged invalid by a court of competent jurisdiction, such order or judgment shall be confined in its operation to the controversy in which it was rendered, and shall not affect or invalidate the remainder of any provision of any section of this act or the application of any part thereof to any other person or circumstance and to this end the provisions of each section of this act are hereby declared to be severable.

§ 21. The sum of one hundred thousand dollars (\$100,000), or so much thereof as may be necessary, is hereby appropriated to the state liquor authority, payable on the audit and warrant of the state comptroller on vouch-

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ers certified or approved by the chairman of the authority, out of moneys in the state treasury not otherwise appropriated, in order to carry out the provisions of this act.

§ 22. Sections thirteen, fourteen, twenty and twenty-one of this act shall take effect immediately; sections one, two, three, four, five, six, sixteen, seventeen and nineteen of this act shall take effect June first, nineteen hundred sixty-four; and sections seven, eight, nine, ten, eleven, twelve, fifteen and eighteen of this act shall take effect October thirty-first, nineteen hundred sixty-four, except that those provisions of section twelve of this act requiring the filing of schedules on or before September ten, nineteen hundred sixty-four shall take effect September first, nineteen hundred sixty-four.

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# Supreme Court of the United States

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October Term, 1965

No. ....

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*

*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,  
ROBERT E. DOYLE, constituting the State Liquor Au-  
thority, and LOUIS J. LEFKOWITZ, Attorney General  
of the State of New York,

*Appellees.*

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ON APPEAL FROM THE COURT OF APPEALS  
OF THE STATE OF NEW YORK

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## MOTION TO DISMISS APPEAL

Appellees move to dismiss appellants' appeal upon the ground that there is not presented any substantial federal question.

### Statement of the Case

The action, brought by distillers and wholesalers of alcoholic beverages, sought judgment declaring invalid two provisions of a 1964 general amendment (Chapter 531 of the Laws of 1964) of the Alcoholic Beverage Control Law of the State of New York\*. The sections challenged are

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\* The Alcoholic Beverage Control Law regulates the sale of alcoholic beverages within the State of New York. Those trafficking in alcoholic beverages in the state are required to be licensed and the provisions for licensing are contained in this Law.

§ 9 of chapter 531 and certain provisions of § 7, subdivision 3 (a). The text of these provisions is set forth in full in Appendix D hereto.

The concentration of plaintiffs' attack is and has been throughout on § 9.

Section 9 requires that as to the monthly schedules of brand owners', distillers' or manufacturers' prices to wholesalers, and of wholesalers' prices to retailers which schedules, since 1942, are required under the Alcoholic Beverage Control Law to be filed for the ensuing month, there now must be filed an affirmation verified by the brand owner that the brand price in the schedules is not higher than the lowest price at which the same item was sold by the brand owner or wholesaler designated as agent or by a related person,\* in the United States outside the State of New York, in the month preceding that in which the schedule is filed.

Two provisions of § 7 of the 1964 statute which plaintiffs attack are the following: The provision which requires price schedules to contain the bottle and case price paid by the seller. Necessarily this means the bottle and case price when the seller has *paid* a bottle and case price.

The other is that which provides that the prohibition against sale to or purchase by a wholesaler, unless price schedules are filed, applies "irrespective of place of sale or delivery". Necessarily this affects only wholesalers licensed to sell in New York (Alcoholic Beverage Control Law § 105[16]), sale to or purchase by wholesalers for resale in New York, and schedule of prices within New York State. The words "irrespective of place of sale or delivery" serve to eliminate any contentions that sale is not in

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\* Related person is defined in the statute, § 9 ¶ 3 subdivisions d and f.

New York when a New York wholesaler takes delivery at out-of-state distilleries (See *infra* pp. 10-11).

Prior to the general amendment of the Alcoholic Beverage Control Law of the State of New York in 1964 in which §§ 9 and 7 were contained, there had in 1963 been a Moreland Commission appointed by Governor Rockefeller to undertake a "thorough study and reappraisal of the [New York Alcoholic Beverage Control] Law with respect to the sale and distribution of alcoholic beverages in the State, to examine and investigate \* \* \* the methods and practices of manufacturers, distributors and retailers of alcoholic beverages in the State" and to propose any revisions of the law which might be found necessary "in the light of experience and current social and economic conditions" (Executive Order February 15, 1963).

The Moreland Commission found\* that prices to wholesalers and retailers in New York State were so much higher than they generally were outside New York State that many retail prices to consumers elsewhere were lower than the prices paid by retailers to wholesalers in New York. The Moreland Commission also found that cost of alcoholic beverages had no relation to temperance; that high prices did not reduce the volume of consumption of alcoholic beverages; low prices did not increase it. It was found that all that high prices did was benefit the brand owners and exploit the consumer. To eliminate such discrimination and exploitation, § 9 was enacted with the goal of bringing New York prices to wholesalers and retailers down and thus make it possible for prices to consumers to be reduced. Such prices it had been found were \$1 to \$1.50 a fifth higher

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\* Moreland Commission Report No. 3; Interim Report; Study Paper No. 5.

in New York State than they are for the most part outside New York State.

### **Decisions of the New York Courts**

The statutory provisions attacked were upheld by the New York State Supreme Court (where the action was commenced); by the New York State Appellate Division (unanimously); and by the New York Court of Appeals (three Judges dissenting). The opinion of the New York Supreme Court, Special Term, Albany County (Appendix C hereto) is reported at 45 N. Y. Misc. 2d 956, 258 N. Y. S. 2d 442. The opinion of the New York Supreme Court, Appellate Division, Third Department (Appendix B hereto) is reported at 23 N. Y. A. D. 2d 933, 259 N. Y. S. 2d 644. The opinion of the Court of Appeals and the dissenting opinion (Appendix A hereto) are reported at 16 N. Y. 2d 47, 262 N. Y. S. 2d 75.

### **ARGUMENT**

**The case presents no substantial federal question. The questions appellants urge as meriting consideration by this Court either are conclusively foreclosed by prior decisions of this Court or do not raise a question of constitutional substance.**

We shall take up each question listed in appellants' Jurisdictional Statement (pp. 5-6) and show that it does not present a substantial federal question meriting this Court's taking jurisdiction of this appeal.

#### **A. Questions 1 and 3—21st Amendment and the Commerce Clause.**

We suggest that in their first question appellants are not setting forth a question of validity of the statute involved

under the Twenty-first Amendment, but making an argument premised on their contentions of the impact of the statute. Accurately, it is submitted, the question is:

May the State of New York under the Twenty-first Amendment to the Constitution of the United States enact a statute that requires in substance that brand owners of alcoholic beverages (who must be licensed by the State in order to sell their products within the State and are regulated by the State) must file verified affirmations, with the monthly schedules of prices required to be filed by brand owners and wholesalers, that the brand prices in New York State to wholesalers and retailers by the brand owner or by any person who has the status of related person to the brand owner, as defined by the statute, are no higher than the lowest prices at which such brands were sold in the preceding month in the United States outside New York State to wholesalers and retailers by the brand owners or by a related person.

This question was answered in the affirmative by the New York Courts. It is submitted that the decisions of this Court interpreting and applying the Twenty-first Amendment conclusively support such decisions by the New York Courts, and foreclose any controversy thereon.

Soon after the adoption of the Twenty-first Amendment this Court made clear that by virtue of its provisions the States are unconfined by traditional Commerce Clause limitations in respect to regulation of traffic in alcoholic beverages, its use, distribution, or consumption within State borders. *State Board v. Young's Market Co.*, 299 U. S. 59 (1936); *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401 (1939); *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391 (1939); *Joseph S. Finch & Co. v.*

*McKittrick*, 305 U. S. 395 (1939); *Ziffrin, Inc. v. Reeves*, 308 U. S. 132 (1939); *Carter v. Virginia*, 321 U. S. 131 (1944).

This Court has never departed from the principles of these decisions. In denying in 1958 a motion by the State of California to file an original bill of complaint against the State of Washington wherein it was alleged that Washington had erected trade barriers to the sale of California wine in Washington in violation of the Commerce Clause, this Court's *per curiam* opinion (*California v. Washington*, 358 U. S. 64) summarily disposed of the contention, citing as authority the Twenty-first Amendment and the Court's earlier decisions which we have noted *supra*, p. 5.

Appellants contend (Jurisdictional Statement, p. 25) that this Court has failed to endorse its earlier statements in respect to the breadth of the Twenty-first Amendment. On the contrary in—*Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 24 (1964), Mr. Justice STEWART, writing for the majority, reaffirmed in the clearest possible language the earlier interpretation by this Court of the Twenty-first Amendment (377 U. S. at p. 330):

“This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. \* \* \*”

“This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders *has remained unquestioned*. See *California v. Washington*, 358 U. S. 64. \* \* \*” (Emphasis supplied.)

Similarly, in *Department of Revenue v. Beam Distilling Co.*, 377 U. S. 341, 346 (1964):



"There can surely be no doubt \* \* \* of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use or consumption of intoxicants within her territory after they have been imported."

Were the subject matter involved in this case not traffic in alcoholic beverages, that the law might have impact (as appellants assert it does) on appellants' operations outside the State of New York would not bring it into conflict with the Commerce Clause (*Osborn v. Ozlin*, 310 U. S. 53, 62 [1940]; *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444-445 [1940]; *Hooperston v. Cullen*, 318 U. S. 313, 320-321 [1943]; *Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 426-427 [1937]; *Watson v. Employers Liability Corp.*, 348 U. S. 66, 72, 73 [1954]).

#### **B. Question 2—Sherman and Robinson-Patman Acts**

The Sherman Act and Robinson Act are irrelative to the statute here. Therefore there is no issue under the Supremacy Clause of the Constitution.

The Sherman Act and the Robinson-Patman Act are both concerned with interstate as distinguished from intrastate commerce. Since § 9, as well as the other provisions of the Alcoholic Beverage Control Law of the State, regulate and control the sale and distribution of intoxicating beverages within the State of New York only, neither Act has any relevance or bearing in this case.

Moreover the statute does not act upon monopolistic or anti-competitive practices as does the Sherman Act. It is not an anti-monopoly statute. The Legislature of the State of New York found that New York consumers had been paying unjustifiably higher prices for liquor than consumers in other states. Section 9 was enacted in an effort by the Legis-

lature to end this discrimination by all major brand owners against the New York consumer.

There is thus no conflict between the New York statute and the Robinson-Patman and Sherman Acts, and the "teaching of this Court's decisions," as pointed out by Mr. Justice STEWART in *Huron Cement Co. v. Detroit*, 362 U. S. 440 (1960) "enjoin seeking out conflicts between state and federal regulation where none clearly exists." *Id.* at 446.

#### C. Question 4—Due Process Clause

Throughout appellants' argument upon their question four runs the contention that the "no higher than the lowest price" provision of § 9 does not affirmatively promote temperance and thus it is not a proper exercise of the police power because, they declare, all liquor legislation must promote temperance. But if we review the subject of state enactments upheld by this Court under the Twenty-first Amendment, appellants' thesis, and with it their argument of the substantiality of their due process question, fall.

In *State Board v. Young's Market Co.*, *supra*, a California statute which exacted a \$500. annual license fee for the privilege of importing beer from other states, obviously designed to protect local from foreign beer, was upheld.

In *Mahoney v. Joseph Triner Corp.*, *supra*, a Minnesota statute imposing additional processing conditions on liquor imported from other States was sustained, the Court noting that the statute "clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere." (304 U. S. at 403.)

Also held valid in *Indianapolis Brewing Co. v. Liquor Control Commission*, *supra*, and *Joseph S. Finch & Co. v.*

*McKittrick, supra*, were retaliatory laws enacted by Michigan and Missouri respectively, which prohibited the importation or sale of beer manufactured in a State discriminating against beer produced in Michigan (*Indianapolis Brewing Co. case*) or Missouri (*Finch case*). In the *Indianapolis Brewing case*, the contention that the Michigan statute violated the due process clause was summarily rejected. (305 U. S. at 304.)

Obviously the legislation upheld in these cases was not designed to promote temperance. Thus there is no merit whatsoever to appellants' argument that all liquor legislation must affirmatively promote temperance to be permissible under the Twenty-first Amendment.

Nor is there any merit to appellants' contention that police power legislation is valid only if designed to advance the health, safety and so on. This same argument was made in the *Young's Market case, supra* (299 U. S. 59, 63) and rejected by this Court on the ground that since the Twenty-first Amendment granted the States an unconditioned authority to prohibit totally the importation of intoxicants, it logically followed that any discriminatory restriction was equally valid, notwithstanding the absence of any connection between such restriction and public health, safety or morals. Section 9 was designed to protect the public welfare of the People of the State of New York who, as consumers, the Legislature found, were being discriminated against by having to pay an unjustifiably higher price for alcoholic beverages than consumers in other states.

The police power is not limited to enactments for protection of health, safety, morals and the like. It encompasses under the power of protection of the general welfare, the protection of the People from economic disad-

vantaging at the hands of business. Therefore, limitation of maximum prices by private industry is upheld by this Court (*Gold, et al. v. DiCarlo*, 380 U. S. 520 [1965], aff'g 235 F. Supp. 817, 820-821; *Townsend v. Yeomans*, 301 U. S. 441 [1937]; *Olsen v. Nebraska*, 313 U. S. 236 [1941]; *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251 [1931]; *Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 427 [1937].

With respect to the purely speculative and conjectural difficulties of compliance with § 9 which appellants argue, it is submitted that these asserted problems—if indeed there would be such—do not present the type of questions which will persuade this Court to take jurisdiction of a case as presenting a substantial federal question.

#### **D. Question 5—Equal Protection Clause**

Appellants' argument that there is a violation of equal protection in that the provisions of § 9 do not include certain dealers in alcoholic beverages in the State (Jurisdictional Statement, pp. 60-62) is completely answered by the principles that "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same" (*Tigner v. Texas*, 310 U. S. 141, 147 [1940]), and that a statute is not rendered unconstitutional as violating equal protection because others might have been included within its coverage but were not (*Watson v. Maryland*, 218 U. S. 173, 179-180 [1918]).

#### **E. Question 6—As to "certain parts" of Section 7**

There is just no semblance of a constitutional question in respect to Section 7. Appellants' challenge to it (Jurisdictional Statement, pp. 63-64) is the creature of a forced construction of the section.

The highest Court of the State of New York has construed the provision contrary to appellants' construction of it, and so as to leave no vestige of possibility of any constitutional infirmity in it. (Court of Appeals Opinion, Appendix A; see also Judge STALEY's Opinion, Appendix C.) The construction of a State statute by the highest Court of the State of its enactment is accepted by this Court.

### CONCLUSION

The appeal should be dismissed upon the ground that it does not present any substantial federal question warranting this Court taking jurisdiction, or the decision of the Court of Appeals of New York should be affirmed.

Dated: October 4, 1965.

Respectfully submitted,

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**Appendix A****COURT OF APPEALS OF THE STATE OF  
NEW YORK**

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JOSEPH E. SEAGRAM & SONS, INC., & ors.,  
*Appellants,*

*vs.*

DONALD S. HOSTETTER, Chairman, & ors., constitut-  
ing the State Liquor Authority, and LOUIS J. LEFKO-  
WITZ, Attorney General of the State of New York,  
*Respondents.*

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Decided July 9, 1965.

**BERGAN, J.**

In 1963 in response to malfunctions in the administration of the State's liquor law and public dissatisfaction with controls on the sale of alcoholic beverages, the Governor appointed a Moreland Commission directed to make a "study and reappraisal" of the law.

In appointing the Commission the Governor noted that since the enactment of the Alcoholic Beverage Control Law in 1934, soon after the end of prohibition, there had been "no major reappraisal or revision of the law in the light of experience and current social problems and economic conditions".

The Commission addressed itself, among other things, to the price of liquor in New York and the effect of price on temperance in the use of liquor. One of the basic assumptions of the statute then in effect was that if the price of liquor were cheap, its consumption would increase and the policy effected by the statute was to sustain the price.

Former section 101-c of the Alcoholic Beverage Control Law had authorized a manufacturer who was a "brand" owner to fix the minimum retail prices for that brand, for the violation of which the retailer was subject to discipline by the State Liquor Authority (subd. 7). The statute (§ 101-b, subd. 3) had for over 20 years also provided for filing price schedules by brand owners and wholesalers.

The Commission's studies led it to believe that the assumed favorable relation of high priced liquor to temperance was chimerical. The prices of liquor in New York were high, but consumption had steadily risen and this did not indicate high prices increased temperance. It found "a greater than average" per capita consumption in New York (*Moreland Com. Report No. 1*, p. 3).

The principal benefit from the minimum price requirement for liquor in New York went to the liquor interests. This served "merely", said the Commission, "to insure profit margins of the various segments of the industry" (*Report No. 3*, p. 19, offered as Exh. E by plaintiffs at Special Term) and "the argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it" is "unfounded" (*id.*, p. 17).

Its studies showed no correlation between consumption and prices, looking at the experience in states in which prices were high compared with those in which they were low.

It found in effect gross price discrimination against the New York consumer by the industry. It developed that the retail price for a fifth of a well-known brand of liquor was lower in Washington, D. C. than the wholesale price in New York. One brand, for example, cost \$2.85 retail in Washington and \$3.45 wholesale in New York, another \$3.39 and \$4.15 respectively (see *Report No. 3*, pp. 5, 6).



This report adds: "For almost every fifth of whiskey that he buys, the New York consumer pays 50 cents to \$1.50 more than the price at which it is available in at least seven free price markets" (p. 78).

On the basis of these reports the Governor made recommendations to the Legislature (*Message*, February 10, 1964). He observed that the administration of the State's liquor law had been marked by "periodic instances of corruption and favoritism". He noted the favored position of the liquor industry in an area which was the subject of public regulation and that the Moreland Commission had reported "it is contrary to the public interest to have the regulated industry in such a dominant role". He added that the Commission had sought means of "Bringing justice to the consumer by putting to an end artificial devices whereby the liquor industry has received uniquely beneficial treatment at the consumer's expense."

The Governor also noted that as a result of the distiller-fixed consumer prices under the statute a "surcharge" had been "foisted on New Yorkers" of \$150 million a year over what would have been paid in a free market.

The result of the Commission study and the Governor's recommendations was the enactment of a statute by the Legislature (L. 1964, ch. 531) which, among other things, vitally changed the direction of liquor price policy in New York and sought to reduce consumer prices.

This suit is maintained by 62 distillers and wholesalers of alcoholic beverages and some importers against the State Liquor Authority and the Attorney General to declare the provisions of the 1964 statute invalid. The main attack is directed to section 9 of the statute; the other is directed to certain parts of section 7. The court at Special

Term in a comprehensive opinion granted judgment for defendants; the Appellate Division affirmed.

In changing the direction of its policy which had been to prevent prices from going too low by establishing effective devices pursuant to which the liquor industry could in effect fix minimum retail prices on brand liquors, the Legislature by section 9 of the 1964 statute set up means which sought to keep down the prices of brand liquors to the consumer. The mechanism is a simple one and it lies technically in the control of the liquor industry. But it is a mechanism to which plaintiffs take vigorous exception on a diversified number of grounds.

The provision is this: On filing the schedules of brand owners' prices to wholesalers, which for 20 years had to be filed monthly under the former provisions of section 101-b, the brand owner or his designee must file an affirmation "that the bottle and case price" to wholesalers in New York "is no higher than the lowest price at which such item of liquor" was sold the previous month to any wholesaler elsewhere in the country or any state or state agency operating a public liquor enterprise (§ 9).

Thus it was sought to end the discrimination by the liquor industry against the New York consumer which, as the Commission had found, cost the New York consumer 150 million dollars a year above that which a free market would have offered.

This change from a favored and protected profit position to a possibly sparse profit situation may make it economically difficult for the liquor industry. If it does it is within the competence of the New York Legislature to make it that way. Even without Article XXI of the United States Constitution, New York could end the liquor traffic within its borders entirely. The State of Mississippi, for example,

prevents the plaintiffs or anyone else from selling liquor there and no one doubts its power to do so. But the twenty-first amendment spells out an additional specific and federally-protected right of each state to eliminate as well as regulate the liquor traffic within its borders (*Mahoney v. Triner Corp.*, 304 U. S. 401).

A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture.

If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of opinion they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers.

In effect the dependence of the New York price on the maximum price of the distiller for his brand elsewhere is to tie the price in this State in to a national price. There is nothing unreasonable about that. It is not an interference with interstate commerce. The effect is on what the distiller charges here and is an effect closely associated with operations of the sale and distribution of liquor within the State.

That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor; or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a

device within the power of the State to employ in this regulated activity.

There is in the record proof offered at Special Term by plaintiffs in an exhibit (Exh. C attached to the affidavit of Thomas F. Daly) consisting of excerpts of the testimony before a legislative committee of Judge LAWRENCE E. WALSH, the Moreland Commissioner, who personally opposed the kind of regulation prescribed by section 9, in which the statement is made that in the liquor industry, "the whole sum total of that relationship averages out to a price that is average throughout the country".

He cited Pennsylvania, a monopoly state, "the largest purchaser of liquor in the world \* \* \* (\$400,000,000 worth of liquor a year—one customer)" as being an example of a customer who insists "on the lowest price that the distiller offers anywhere in the country".

In the light of this kind of national marketing situation, the actual difficulty of the distiller in seeing to it that the New York buyer pays no more than "the lowest price" elsewhere seems greatly overstressed.

Under section 9 the distillers themselves control the base price since they fix the lowest price elsewhere. If its effect on New York is too low a price they have it within their power to raise the lowest price elsewhere. The industry must absorb any differential cost in doing business as one of the incidents to a highly regulated industry. The incidental effect of this on prices in another state do not invalidate the New York statute.

The requirement of section 9 is not, indeed, unusual in concept and those states which have state liquor monopolies, we are told, require the distillers to warrant that the price charged the State monopoly for brand liquors is no

higher than the price charged in other states. Thus we think the price regulation in the 1964 statute is neither impossible of compliance nor unreasonable.

It is thoroughly settled that when it comes to the regulation of liquor traffic a wide area of public power may be exercised in plenary fashion by State governments without Federal interference either under the commerce clause or under the equal protection provisions of the Constitution.

A leading decision is *State Board v. Young's Market Co.* (299 U. S. 59) where the court in an opinion by Mr. Justice BRANDEIS sustained a statute imposing a license fee for the privilege of importing beer from other states against the argument that it violated both the commerce clause and the equal protection clause.

In the same direction is *Mahoney v. Triner Corp.* (304 U. S. 401, *supra*); again in an opinion by Justice BRANDEIS the court sustained a Minnesota statute imposing additional processing conditions on liquor coming from other states, a statute which the court noted "clearly discriminates in favor of liquor processed within the State against liquor completely processed elsewhere" (p. 403).

Similarly discriminating statutes in Michigan which prohibited dealers in beer there from selling beer manufactured in other states which in turn discriminated against beer manufactured in Michigan (*Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391) and to the same effect in Missouri (*Finch & Co. v. McKettrick*, 305 U. S. 395) were each sustained. The statute before us could scarcely be deemed to have as much impact on the plaintiffs' federal rights as these.

In *Ziffrin, Inc. v. Reeves* (308 U. S. 132) a Kentucky statute confining the transportation of liquor to licensed

common carriers was sustained, with Mr. Justice McREYNOLDS propounding the question: "Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions?" And making the answer: "Former opinions here make an affirmative answer imperative."

As the Appellate Division opinion noted, nothing in the later decisions of the court upon which appellants mainly rely suggests that the basic power of New York to control the liquor traffic has been impaired. The holding of *U. S. v. Frankfort Distilleries* (324 U. S. 293) is merely that liquor producers, wholesalers and retailers may conspire unlawfully to fix prices in violation of the Sherman Act. Nothing in that decision sustains any part of plaintiffs' contention.

And *Hostetter v. Idlewild Liquor Corp.* (377 U. S. 324) and *Dept. of Revenue v. James Beam Co.* (377 U. S. 341) are irrelevant to the case before us. The principles announced in the earlier cases were reenforced in 1958 in the denial of the application of California to file a bill of complaint against Washington (*California v. Washington*, 358 U. S. 64).

On the general exercise of State powers in matters affecting the welfare of a State and its people, liquor aside, see *Hoopeston Co. v. Cullen* (318 U. S. 313; *Huron Cement Co. v. Detroit* (362 U. S. 440); *Osborn v. Ozlin* (310 U. S. 53).

The provisions of section 9 are not transformed into an "anti-trust measure" in conflict with the supremacy clause on the basis of plaintiffs' conception that the statute is not "a device to promote temperance"; nor are they for similar reasons in conflict with the Robinson-Patman Act. It

is a strained argument to make, as plaintiffs do, that there must be "free competition" in liquor at the risk of violation of the Sherman Act; and it is almost equally strange to say that because New York tries to correct an evil in the sale of liquor by providing price criteria operative here, it "will impair the successful operation of alcoholic beverage control in other states".

Plaintiffs also attack the validity of portions of section 7 of the 1964 statute which require that filed price schedules show the bottle and case price paid by a retailer; and the portion of the section which prohibits sale or purchase by a wholesaler unless schedules are filed by brand owners "irrespective of the place of sale or delivery".

It is said by appellants that those requirements "can only mean" that sales by brand owners "in every state" must be filed with the New York authority.

The statute is concerned with New York practices and if the sales in other states have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intra-state sale of liquor.

Throughout the argument of plaintiffs on constitutional and other issues, runs the thread of their contention that the 1964 statute is not suited to the promotion of temperance and hence the main justification of a valid regulation of liquor is lost.

In summarizing their position in a reply brief plaintiffs say: "At issue here is whether Section 9 of Chapter 531 affirmatively promotes temperance". As to what best pro-



notes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry.

The order should be affirmed with costs.

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DESMOND, CH. J. (dissenting):

Of plaintiffs' several serious and impressive arguments against the validity of sections 7 and 9 of chapter 531 of the Laws of 1964, one remains unanswered and to my mind unanswerable. It comes down to this: mandatory establishing of minimum prices for sales by bottle or case of "brand name" alcoholic beverages is beyond the power of our State Legislation, is an unconstitutional (U. S. Const., 5th and 14th Amendment; N. Y. Const., art. I, § 6) taking of private property without due process or compensation, and is not justified as a police power exercise since it is not necessary for or related to the health, safety, morals or welfare of the State's inhabitants or required by any emergency. Bringing New York State liquor prices into line with those of comparable localities may accord with general ideas of fairness, and our people may have cause to complain about marketing and pricing practices of plaintiffs which are said to result in the charging of premium prices in the package stores of New York State. But we are talking now about constitutional protections against arbitrary interferences by government with free price markets. Statutory price controls on food, housing accommodations or other essentials of life is a valid exercise of the State's far-ranging police power which is born out of public needs (*Nebbia v. New York*, 291 U. S. 502, 525 *et seq.*). Those items are regulated as to price because they are among the "great public needs"

referred to in *People v. Nebbia* (262 N. Y. 259, 270). But even the police power is limitable and the courts have the same duty to nullify unconstitutional legislative acts as to uphold statutes which satisfy or tend to satisfy or may reasonably be expected to satisfy some health, safety or welfare need. If no such relevance is discoverable, a statute infringing on the constitutionally protected rights of private property in price-fixing or similar restraints must fall (*Defiance Milk Products Co. v. DuMond*, 309 N. Y. 537; *Trio Corp. v. City*, 2 N. Y. 2d 690; *Loblaw Inc. v. State Board*, 11 N. Y. 2d 102). In each of those three cases we held a statute violative of due process because it needlessly and arbitrarily forbade an otherwise valid business practice.

No one will question the traditional rights of the States (taken away by the Eighteenth Amendment but restored by the Twenty-first) under their inherent police power to prohibit, restrain or regulate the manufacture, sale and use of intoxicants (*Calvary Church v. State Liquor Authority*, 245 App. Div. 176, 178, affd. 270 N. Y. 497; *Mahoney v. Triner*, 304 U. S. 401). The New York Legislature has power to enact a variety of laws calculated to suppress intemperance or to minimize the known evils of the liquor traffic, since the trade is one as to which there is a recognized public interest. But "police power" is not a magic incantation to frighten off judicial investigation into the constitutionality of statutes. The State of New York could completely outlaw the sale of liquor but, having chosen instead to regulate it, the restrictions and requirements can be such only as are necessary to protect public safety, health and morals from the evils, known or apprehended, of the trade. The State's licensees may be subjected to the strictest supervision and control (as

scores of appellate court decisions in this State attest) but such supervision and control must at least tend to preserve public order and discourage the intemperate use of alcohol. No one has yet told us how any of these lawful purposes could be accomplished or furthered by forcing liquor prices down to the bottom level found anywhere in the United States. To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of excessive smoking by abolishing cigarette taxes.

This statute cannot be saved by recourse to the familiar aphorisms about presuming a statute's constitutionality or presuming that investigation has shown necessity, or avoiding the substitution of a court's judgment for a Legislature's, or the like. Those who attack a price-fixing law have the burden of showing its unconstitutionality beyond any reasonable doubt (*Lincoln v. Barr*, 1 N. Y. 2d 413) but that burden is met when the attackers show as they do here that the only reason suggested or available for its enactment—that is, eliminating “price discrimination” against our State's residents has no relationship to any public need or evil of the kind which justifies use of the police power (*Defiance Milk Products Co. v. DuMond*, 309 N. Y. 537, 540-541, *supra*). Indeed, in section 8 of those 1964 amendments to section 101-b of the Alcoholic Beverage Control Law, the Legislature has forthrightly told us that its purpose and interest was solely to reduce the prices charged for brand-name liquor in this State. That was a long retreat from the old announced policy (see old section 101-c as enacted in 1950) of promoting temperance by eliminating price wars, by prohibiting sales below announced minima and by mandating resale price maintenance. It is a non-sequitur that since artificially jacking up the prices under earlier statutes did not promote tem-

perance, forcing them down to the lowest levels in the whole country will be a step toward moderation in use.

It is suggested that we should respect and accept the judgment of the Legislature and the Governor that price limitation will further temperance. But the assumption against the fact that such was the purpose runs against the declared fact. Neither the Governor nor the Legislature ever offered such a vain argument, and we must remember that sections 7 and 9 were not among the recommendations of the distinguished Moreland Act Commissioners appointed by the Governor. Temperance is a laudable objective and a proper State purpose but no one has the temerity to assert that cut-price liquor cuts down drinking. Therefore, it follows of absolute necessity that these amendments have nothing to do with the State policy written into section 2 of the State Alcoholic Beverage Control Law right after repeal of National Prohibition: "to regulate and control the manufacture, sale and distribution within the State of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for an obedience to law."

Even if these statutes could survive Federal constitutionality tests they are void for arbitrariness under our own decisions such as *Defiance Milk Products Co. v. DuMond*, 309 N. Y. 537, *supra*; *Trio Corp. v. City*, 2 N. Y. 2d 690; *Grove Hill Co. v. Ferncliff Cemetery Assn.*, 7 N. Y. 2d 403, 410; and *Loblaw Inc. v. State Board*, 11 N. Y. 2d 102. Police power statutes under the New York State Constitution are valid only if the legislation is addressed to a legitimate end and, also, if the measures taken are reasonable and appropriate to that end (*Matter of Title & Mtge. Guar. Co.*, 264 N. Y. 69, 83)—that is, such a statute must be "reasonably related and applied to some actual

and manifest evil." (*Defiance Milk Products Co. v. Du-Mond, supra*; *Twentieth Century v. Waldman*, 294 N. Y. 571, 580, appeal dismissed 326 U. S. 697; *East New York v. Hahn*, 293 N. Y. 622, 627, *affd.* 326 U. S. 230; *Department of Buildings v. City*, 14 N. Y. 2d 294, 297). The only "evil" against which this legislation is directed is found, apparently, in the fact that some people somewhere in this country under other unknown and uninvestigated conditions buy liquor more cheaply than we do. If this be good law, similar statutes may be passed as to any sale-licensed commodity.

I do not, although failing to discuss them at length, overlook a number of other troublesome aspects of these amendments. These difficulties may be summed up by the statement that it is wholly arbitrary to force New York State liquor prices down to the lowest level prevailing anywhere in America, despite higher license fees charged in this State, despite higher wages and salaries here (and conversely a small volume of sales by some of the distributors-plaintiffs), despite the fact that abnormally low prices somewhere in the country may be due to temporary conditions totally unrelated to New York State prices, and despite the predictable and remarkable result that the distillers now may (or must) raise prices elsewhere in order to reap even a better harvest in the enormous New York State market.

The judgment should be reversed and judgment directed for plaintiffs as demanded in the complaint, with costs in all courts.

\* \* \*

Order affirmed, with costs. Opinion by Bergan, J. All concur except Desmond, Ch. J., who dissents and votes to

reverse in an opinion in which Fuld and Burke, JJ., concur.

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**Appendix B**

**OPINION OF SUPREME COURT—APPELLATE  
DIVISION**

**THIRD JUDICIAL DEPARTMENT**

May 13, 1965.

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JOSEPH E. SEAGRAM & SONS, INC. *et al.*,  
*Appellants,*  
*v.*

DONALD S. HOSTETTER *et al.*, Constituting the State  
Liquor Authority, and LOUIS J. LEFKOWITZ, At-  
torney General of the State of New York,  
*Respondents.*

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*Per Curiam.*

APPEAL (1) from so much of an order of the Supreme Court at Special Term as denied plaintiff's motion for a preliminary injunction and granted defendants' cross motion for summary judgment awarding declaratory judgment, as demanded in the counterclaim, that certain acts amendatory of the Alcoholic Beverage Control Law are constitutional and otherwise valid, and (2) from the judgment entered upon said order. (Opinion: — Misc. 2d —.) MOTION for a temporary restraining order.

The action is brought by distillers, importers and wholesalers of liquor sold in New York for judgment (1) de-

claring that the provisions of section 9 of chapter 531 of the Laws of 1964, amending subdivision 3 of section 101-b of the Alcoholic Beverage Control Law, and certain of the provisions of section 7 of said chapter, amending paragraph (a) of subdivision 3 of section 101-b of the same act, are invalid as violative of the commerce and supremacy clauses of the Constitution of the United States (U. S. Const., art. 1, § 8, cl. 3; art. VI, cl. 2) and as violative, also, of the due process and equal protection clauses of the Constitutions of the United States and the State of New York (U. S. Const., 14th Amdt., § 2; N. Y. Const., art. I, §§ 6, 11), and (2) enjoining the imposition of penalties for failure of compliance with such allegedly invalid provisions.

Appellants' many-pronged attack is directed principally to the provisions requiring, in substance, that each distiller and wholesaler offer New York purchasers in respect of each brand sold by him a price no higher than the lowest price at which such item was sold elsewhere in the United States as shown by schedules and affirmations required to be filed by him.

The case thus involves important constitutional questions respecting legislation of social consequence and of wide application; it is well and thoroughly briefed and is presented upon an adequate record; it will, most likely, be further reviewed; and under all these circumstances we deem it the function of this intermediate appellate court to reach its determination promptly and to state it succinctly and without elaboration.

The legislative policy sought to be effectuated by the amendments in dispute was declared to be, among other things, to foster price competition, to eliminate dis-



crimination against New York consumers and "to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination", price discrimination and favoritism being found "contrary to the best interests and welfare of the people of this state". (L. 1964, ch. 531, § 8.)

Neither in the record nor in appellants' argument do we find a substantial basis for the assertion that equal protection has been denied. In the light of the legislative history and studies and, so far as applicable, the studies and reports of the Moreland Act Commission, and upon our finding that the strong supportive presumptions have not been overcome, we conclude that the enactment constitutes a valid exercise of the police power and effects no deprivation of due process.

Appellants argue forcefully that the maximum price provisions of the amendments contravene the Robinson-Patman Act (U. S. Code, tit. 15, §§ 13 *et seq.*) and the Sherman Act (U. S. Code, tit. 15, §§ 1-7), and thus are violative of the supremacy clause and that the challenged amendments offend the commerce clause as well. The complete answer is, we believe, that the legislation lies well within the area of liquor traffic regulation in which, under the Federal Constitution, effective control may be exercised by the States. (U. S. Const., 21st Amdt., § 2; *State Bd. of Equalization v. Young's Market Co.*, 299 U. S. 59; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Control Comm.*, 305 U. S. 391; *Finch & Co. v. McKittrick*, 305 U. S. 395.) The later authorities, upon which appellants principally rely (see, *e.g.*, *United States v. Frankfort Distilleries*, 324 U. S. 293; *Hostetter v. Idlewild Bon Voyage Liq. Corp.*, 377 U. S. 324; *Department of Revenue v. James B. Beam Distilling Co.*, 377 U. S. 341),

seem readily distinguishable from the older cases, above cited, and from the case before us. In *Frankfort* was involved a criminal prosecution, which the Court held (p. 299) was not barred by the 21st Amendment, which "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries"; and the Court was careful to point out (p. 299) that the Sherman Act "is not being enforced in this case in such manner as to conflict with the law of Colorado." Unlike the case before us, neither *Idlewild* nor *Beam* concerned an attempt by a State to exert *internal* control, within the ambit of the 21st Amendment, but, rather, involved taxing procedures long recognized as illegal.

Appellants' remaining contentions seem to us unsubstantial and do not require discussion.

Judgment affirmed, with costs. Motion for temporary restraining order denied, without costs. Application for permission to appeal to the Court of Appeals granted, without costs.

Gibson, P. J., Herlihy, Taylor, Aulisi and Hamm, JJ., concur.

## Appendix C

OPINION OF JUDGE STALEY  
SUPREME COURT OF THE STATE OF  
NEW YORK

## COUNTY OF ALBANY

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JOSEPH E. SEAGRAM & SONS INC., THE HOUSE OF SEAGRAM, INC., STITZEL-WELLER DISTILLERY, INC., THE PADDINGTON CORPORATION, HIRAM WALKER INCORPORATED, GOODERHAM & WORTS LIMITED, JAS. BARCLAY & CO., LIMITED, W. A. TAYLOR & COMPANY, HIRAM WALKER DISTRIBUTORS, INC., THE AMERICAN DISTILLING COMPANY, McCORMICK DISTILLING COMPANY, THE FLEISCHMANN DISTILLING CORPORATION, MR. BOSTON DISTILLER INC., THE VIKING DISTILLERY, INC., JAMES B. BEAM DISTILLING COMPANY, JAMES B. BEAM IMPORT CORPORATION, SCHENLEY INDUSTRIES, INC., AFFILIATED DISTILLERS BRANDS CORP., KNICKERBOCKER LIQUORS CORP., BARTON DISTILLING COMPANY, BARTON DISTILLERS IMPORT CORPORATION, JULIUS WILE SONS & COMPANY, INC., BACARDI IMPORTS, INC., AUSTIN NICHOLS & COMPANY, INC., CANADA DRY CORPORATION, HEUBLEIN INC., McKESSON & ROBBINS, INC., NATIONAL DISTILLERS AND CHEMICAL CORPORATION, PUBLICER DISTILLERS PRODUCTS, INC., WAYNE LIQUOR CORP., BROWN-FORMAN DISTILLERS CORPORATION, GLENMORE DISTILLERIES COMPANY, A. SMITH BOWMAN DISTILLERY INC., "2;" BRANDS, INC., STAR HILL DISTILLING COMPANY, SCHIEFFELIN & COMPANY, ALPINE WINE & LIQUOR CORP., BEN PERLOW LIQUOR CORP., BISON LIQUOR CO., INC., BLUE CREST WINE AND SPIRIT CORP., BONNY DISTRIBUTING CO., INC., CAPITAL DISTRIBUTORS CORP., CARDINAL DISTRIBUTORS INC., COLONY LIQUOR DISTRIBUTORS, INC., DISTILLED BRANDS, INC., EBER BROS. WINE & LIQUOR CORP., ELMIRA TOBACCO CO., INC., EMPIRE LIQUOR CORP., GRAVES & RODGERS, INC., M. LICHTMAN & CO., INC., MAJOR LIQUOR DISTRIBUTORS INC., MONARCH LIQUOR CORP., MULLEN & GUNN, INC., PEERLESS IMPORTERS CORP., RAMAPO WINE & LIQUOR CORPORATION, ROCHESTER LIQUOR CORPORATION, RODGERS LIQUOR CO., INC., S & K WINE & LIQUOR CORP., STANDARD FOOD PRODUCTS CORP., STANDARD WINE & LIQUOR CO., INC., STAR INDUSTRIES INC., UNIVERSAL LIQUOR CORP.,

*Plaintiffs,**against*

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WILLIAM H. MORGAN, BENJAMIN H. BALCOM, ROBERT E. DOYLE, constituting the State Liquor Authority, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

*Defendants.*


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Supreme Court, Albany County Special Term, December 28, 1964, Calendar #10-241.

Justice Ellis J. Staley, Jr., presiding.

Appearances:

Lord, Day & Lord, Esqs., Attorneys for Plaintiffs, 25 Broadway, New York 4, New York.

Louis J. Lefkowitz, Attorney General, Attorney for Defendants, The Capitol, Albany, New York 12224.

STALEY, JR., J.:

This is a motion for an order restraining the defendants pending the determination of the issues in this action from:

1. Requiring plaintiffs to comply in any manner with any part of section 9, ch. 531 of the Laws of 1964.

2. Requiring those plaintiffs who sell their brands of liquor to wholesalers located in other states as well as to wholesalers in the State of New York to file a schedule of prices at which such liquor is sold to wholesalers in states other than New York "irrespective of the place of sale or delivery" as required by section 7, ch. 531 of the Laws of 1964.

3. Requiring plaintiffs to include in their schedule of prices filed pursuant to section 101-b of the Alcoholic Beverage Control Law the "net bottle and case price paid by seller" as required by section 7, ch. 531 of the Law of 1964.

A cross motion is made by the defendants for an order dismissing the complaint herein or, in the alternative, for judgment declaring section 9 of ch. 531 of the Laws of 1964 and section 7, subdv. 3 (a) of ch. 531 of the Laws of 1964 to be in all respects constitutional and valid. Section 7 and section 9, as herein referred to, in each instance shall mean section 7 and section 9 of ch. 531 of the laws of 1964.

Section 9 added new paragraphs (d), (e), (f), (g), (h), (i), (j) and (k) to subdv. 3 of section 101-b of the Alcoholic Beverage Control Law. Section 7 enacted certain amendments to subdvs. 2, 3, and 4 of section 101-b and added new subdv. 6 to said section.

The provisions of section 7 require monthly schedules of brand owners', distillers' or manufacturers' bottle and case prices and discounts to wholesalers, as well as the net bottle and case price paid by the seller and of wholesalers' prices and discounts to retailers. The sale of liquor or wine to or by a wholesaler or retailer is prohibited unless the required schedules are filed and, in the case of a wholesaler, such prohibition applies irrespective of the place of sale or delivery. Schedules are not required to be filed for an item under a brand owned exclusively by one retailer and sold at retail within the state exclusively by such retailer.

Discrimination in price or discounts and the granting of discounts other than as provided in the section is declared to be unlawful. Penalties are also provided for making any sale or purchase in violation of the provisions of the section or for making a false statement in any schedule or for failing or refusing to comply with the provisions of the section.

In essence section 9 requires that, in addition to the schedules required by section 7, there must be filed an affirmation by the brand owner, or by the wholesaler designated as agent for the purpose of filing the schedule if the owner of the brand is not licensed by the liquor authority that the bottle and case price of liquor to wholesalers set forth in the schedule is no higher than the lowest price at which such item was sold by such brand owner or such wholesaler or any related person to any

wholesaler anywhere in any other State of the United States or in the District of Columbia or to any state which owns and operates retail liquor stores in the month immediately preceding the month in which the schedule is filed. A similar affirmation is required concerning sale to retailers. In the event an affirmation is not filed with respect to an item of liquor the schedule for which the affirmation is required is deemed invalid and such item may not be sold to or purchased by a wholesaler during the period covered by the schedule. Provision is made for determining the lowest price for which any item was sold elsewhere and the making of a false statement in an affirmation is declared to be a misdemeanor.

The intent of the Legislature in making these amendments is set forth in section 8 which provides as follows:

"In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions,

prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination."

The first two causes of action of the complaint seek a declaratory judgment determining (1) that section 9 is unconstitutional and void in that it deprives the plaintiffs named in the first cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's police power; it is inconsistent with the declared policy of the Alcoholic Beverage Control Law as expressed in sections 2 and 101-b (1) of that law; it will not serve to cure the possibility of monopolistic and anti-competitive practices; it contravenes the terms and policy of the Sherman Act, 15 U. S. C. sections 1-7; it is in direct conflict with the Robinson-Patman Act, 15 U. S. C., sections 13(a), 13(b), and 21(a); it violates the Constitution of the United States by interfering with commerce among the states; it violates the Constitution of the State of New York and the Constitution of the United States in that it is discriminatory; (2) that section 7, Subdv. 3(a) is unconstitutional and void in that it violates the Constitution of the United States by interfering with commerce among the states and with foreign commerce and deprives the plaintiffs of property without due process of law; (3) that section 9(f) violates the Constitution of the State of New York and the Constitution of the United States in that it deprives the plaintiff named in the second cause of action of liberty and property without due process of law; it is an arbitrary, capricious and unreasonable exercise of the state's police power; it is likely to cause unwitting violations of the laws of New York and of other states and of the federal anti-trust laws; it is vague and indefinite.



The third and fourth causes of action of the complaint seek an injunction enjoining and restraining the defendants and their successors from imposing any sanctions or penalties for failure to submit the affirmations and verifications required by section 9 and for failure to file the prices and schedules required to be filed by section 7 on the ground that said sections are unconstitutional and void.

The cross motion by the defendants for judgment declaring section 9 and section 7, subdv. 3(a) to be, in all respects, constitutional and valid is, in effect, a motion for summary judgment.

In weighing a challenge of unconstitutionality of a statute the Courts observe the legal principles; that a legislative enactment carries with it an exceedingly strong presumption of constitutionality; that every intendment is in favor of the statute's validity; that the heavy burden of demonstrating unconstitutionality beyond a reasonable doubt rests upon the one who attacks a statute as unconstitutional and that only as a last unavoidable result do Courts strike down a legislative enactment as unconstitutional. (*I. L. F. Y. Co. v. Temporary State Rent Comm.*, 10 N. Y. 2d 263; *Wiggins v. Town of Somers*, 4 N. Y. 2d 215; *Lincoln Bldg. Assoc. v. Barr*, 1 N. Y. 2d 413; *New York State Thruway Authority v. Ashley Motor Court*, 12 A. D. 2d 223, *affd.* 10 N. Y. 2d 151; *Matter of Roosevelt Raceway Inc. v. Monaghan*, 9 N. Y. 2d 293; *Matter of Ahern v. South Buffalo Ry. Co.*, 303 N. Y. 545, *affd.* 344 U. S. 367; *Martin v. State Liquor Authority*, 43 Misc. 2d 682, *affd.* 15 N. Y. 2d 707.)

The judgment of the Courts will not be substituted for that of the Legislature to determine whether the legislation will accomplish the desired end or can be effectively administered.

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Courts no longer employ the due process clause of the Constitution to invalidate State Laws regulatory of business and industrial conditions merely because such laws are deemed unwise or improvident. (*Williamson v. Lee Optical Co.*, 348 U. S. 483; *Gail Turner Nurses Agency, Inc. v. State of New York*, 17 Misc. 2d 273.)

Nor will the Court sit as a superlegislature to weigh the wisdom of each enactment brought before it, or decide whether policy which it expresses offends the welfare of a particular group. (*Day-Brite Light, Inc. v. Missouri*, 342 U. S. 421; *Gail Turner Agency v. State of New York*, *supra*.)

Nor are legislative enactments rendered invalid as a denial of due process or equal protection under the law because they impose financial hardship, result in reduced income or make it impossible for some to continue in a particular business. (*California Automobile Assn. v. Maloney*, 341 U. S. 105; *Breard v. Alexandria*, 341 U. S. 622; *Day-Brite Light, Inc. v. Missouri*, *supra*; *Gail Turner Agency v. State of New York*, *supra*.)

The Legislature is also presumed to have investigated the subject matter of the statute and found facts to support the legislation. (*Martin v. State Liquor Authority*, *supra*.) In this instance the Legislature, in addition, had before it, when it enacted ch. 531 of the Laws of 1964, the Study Papers and Reports of the Moreland Commission. Being an enactment under the police power of the state, the strongest presumption of validity attaches to ch. 531 of the Laws of 1964 and the fact that it causes or might cause an economic hardship to those whom it affects is no argument against its constitutional validity, if it is an otherwise valid exercise of the state's police power. (*N. H. Lyons & Co., Inc. v. Corsi*, 3 N. Y. 2d 60.)

Plaintiffs' attack ch. 531 on the basis that it deprives them of liberty and property without due process of law in violation of the Constitutions of the State of New York and of the United States is contained in paragraphs 53, 90 and 91 of their complaint. In essence these paragraphs allege economic hardships, possible reduced profit margins, expenditures for new equipment, possible difficulty in increasing prices and difficulty in competing in other states. These allegations, even if proven, have no bearing on the constitutionality of the statute. (*California Automobile Assn. v. Maloney, supra; Breard v. Alexandria, supra; Day-Brite Light, Inc. v. Missouri, supra; Gail Turner Agency v. State, supra.*)

Paragraphs 54, 90 and 94 of the plaintiffs' complaint allege that section 9 is an arbitrary, capricious and unreasonable exercise of the state's police power in that the term related person as defined in section 9 is vague; plaintiffs have no power to compel related persons to furnish them with information; price differentials are limited to state gallonage taxes or fees; it is impossible for plaintiffs to determine in any given month the prices at which brands sold by them in New York are sold to wholesalers and/or retailers throughout the United States and the District of Columbia; it is impossible for plaintiffs to determine what is meant by inducements of any kind whatsoever.

The choice of measures is for the Legislature who are presumed to have investigated the subject and to have acted with reason not from caprice. "Legislation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it

is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate." (*People v. Griswold*, 213 N. Y. 92.)

The provisions of ch. 531 requiring filing price schedules and affirmations is not, in of itself, either arbitrary or unreasonable. Such filings are certainly appropriate to the purpose intended of preventing consumers in New York State from being discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states. The fact that the plaintiffs might find it difficult to obtain the required information or are limited by the act in the price differentials allowed, does not make the act arbitrary, capricious and unreasonable.

Plaintiffs' allegations concerning the vagueness of the terms "related person" and "inducements of any kind whatever" are equally without merit. Subdivision 4 of section 7 provides that "The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section." The section referred to is section 101-b of the Alcoholic Beverage Control Law.

The Legislature may and in many cases has enacted statutes in broad outline, leaving to administrative officials enforcing them the duty of arranging the details. (*Matter of National Surety Co.*, 239 App. Div. 490, affd. 264 N. Y. 473; *Matter of People [International Workers Order]*, 199 Misc. 941, affd. 280 App. Div. 517, affd. 305 N. Y. 258; *Martin v. State Liquor Authority*, *supra*.) The Legislature often delegates to an executive officer the power to determine facts and conditions upon which the operation of a statute depends. This delegation of power relates to

the execution of the law rather than to the making of the law. There is no valid objection to such a delegation of power. (*Tropp v. Knickerbocker Village, Inc.*, 205 Misc. 200, affd. 284, App. Div. 935; *Martin v. State Liquor Authority, supra.*)

Plaintiffs' contentions that section 9 is inconsistent with the declared policy of the Alcoholic Beverage Control Law to promote temperance and that section 9 will not serve to cure the possibility of monopolistic and anti-competitive practices at which it is directed are equally insufficient to prove invalidity of the statute.

Paragraphs 57, 58 and 59 of the plaintiffs' complaint consist of allegations that section 9 contravenes the terms and policy of the Sherman Act, 15 U. S. C. sections 1 through 7 and is in direct conflict with the Robinson-Patman Act, 15 U. S. C., sections 13(a), 13(b) and 21(a) and, therefore, must yield to the supremacy of such laws as required by Article VI of the Constitution of the United States.

Paragraph 60 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the United States by interfering with commerce among the states.

There is no doubt that under the twenty-first amendment of the Constitution of the United States that the State of New York may not only regulate, but may completely prohibit the importation of some or all intoxicants destined for use or consumption within its borders and may also restrict, prevent, regulate and control by taxation or otherwise, the distribution, use or consumption of intoxicants within the state. (*California v. Washington*, 358 U. S. 64; *Department of Revenue v. James B. Beam*

*Distilling Co.*, 377 U. S. 341; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324.)

The Alcoholic Beverage Control Law of the State of New York concerns itself solely with the regulation and control of the manufacture, sale and distribution within the State of New York of alcoholic beverages. (Alcoholic Beverage Control Law, section 2.) Any effect which it has on interstate commerce is entirely co-incidental. The regulation and control of the sale and distribution of alcoholic beverages is a matter of local concern and the mere fact that such regulations have or may have some repercussions upon the activities of a business which operates nationwide does not invalidate the state action, particularly where the subject of the action is within the police power of the state. (*Osborn v. Ozlin*, 310 U. S. 53; *Southern Pacific Co. v. Arizona*, 325 U. S. 761; *Watson v. Employers Liability Corp.*, 348 U. S. 66.)

On the other hand the commerce clause of the United States Constitution, the Sherman Act and the Robinson-Patman Act are all concerned with interstate commerce as distinguished from intrastate commerce. Since the purpose of the Alcoholic Beverage Control Law is to regulate and control the intrastate sale and distribution of alcoholic beverages, it does not come within the realm of the commerce clause of the United States Constitution nor of the Sherman Act or of the Robinson-Patman Act.

Paragraph 61 of the plaintiffs' complaint consists of an allegation that section 9 violates the Constitution of the State of New York by discriminatingly imposing maximum price limitations upon sales made by persons dealing in liquor sold under "private labels" and sales made by vintners and wholesalers of wine.

"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." (*Tigner v. Texas*, 310 U. S. 141.) The fact that the Legislature omitted certain ones who might have been included in the statute, does not render it unconstitutional. (*New York Rapid Transit Corp. v. City of New York*, 275 N. Y. 258; *People v. Charles Schweinler Press*, 214 N. Y. 395; *National Psychological Assoc. v. University of State of New York*, 8 N. Y. 2d 197.)

"So long as there is some real difference in the situation, interests and capacity of different classes of citizens, this may be the basis of legislative classification which has a real and reasonable relationship to the difference which thus exists." (*People v. Klinck Packing Co.*, 214 N. Y. 121.)

The Legislature is also presumed to have investigated the subject matter of the legislation and based upon said investigation determined that a different classification should exist for brand owners, private brands and vintners.

Paragraph 63 of the plaintiffs' complaint consists of an allegation that paragraph 3(a) of section 7 violates the Constitution of the United States by requiring schedules for sales "irrespective of the place of sale or delivery" thereby interfering with commerce among the states and with foreign commerce and that the requirement of such schedules to contain the "net bottle and case price paid by the seller" deprives plaintiffs of property without due process of law and is an arbitrary, capricious and unreasonable exercise of the state's police power.

The fallacy of this allegation is in the fact that the plaintiffs fail to take into consideration the purpose of section



7 as is set forth in subdv. (1) thereof and also fail to take into consideration the saving clause or provision in subdv. 3(a).

Subdivision one provides: "It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages \* \* \*." This language sets forth words of limitation and limits the applicability of the law to regulation and control within the state.

Subdivision 3(a) which contains the words "irrespective of the place of sale and delivery" also contains a savings clause which provides as follows: "Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter."

Thus a licensee may purchase liquor for reasons not inconsistent with the purpose of this chapter upon obtaining prior written permission of the authority. It goes without saying that a purchase or sale to a wholesaler for sale or distribution in interstate or foreign commerce would be a purpose not inconsistent with this chapter. The requirement that a licensee obtain prior permission to make such purchases or sales is not such a burden on interstate commerce as to render it invalid under the Commerce Clause of the United States Constitution, particularly when it is taken into consideration; that the term "wholesaler" means licensed wholesaler (section 3, subdv. 35 of the Alcoholic Beverage Control Law) that section 62 of said law permits a licensed wholesaler "to sell and deliver to persons outside the state pursuant to the laws of the place of sale and delivery"; that the state has the power to require its licen-

sees to make all reports which it deems necessary to be made by any licensee (section 17, subdv. 8 of the Alcoholic Beverage Control Law; amendment 21, United States Constitution) and that the state and the Liquor Authority have the right and power to refuse to issue any license or permit provided for in the Alcoholic Beverage Control Law.

Plaintiffs' allegation in this paragraph of their complaint of a violation of due process stands in no better position than their similar allegations in paragraphs 54, 90 and 94 of their complaint. The allegation that the requirement that "net bottle and case price paid by the seller" in no way serves to carry out the policy of the Alcoholic Beverage Control Law is a mere conclusion not supported by fact.

Further, the information would appear to have some value in determining whether the fundamental principles of price competition prevails in the industry and in determining whether unjustifiable prices are being charged to consumer in the state. Thus, this part of the legislation appears to be adapted to the end intended by section 8 of ch. 531. The Court must, therefore, give it effect. (*People v. Griswold, supra.*)

It, thus, clearly appears that the plaintiffs have failed to sustain the burden of demonstrating the unconstitutionality beyond a reasonable doubt. It is, therefore, the opinion of the Court that the sections in question are constitutional. There being no clear question of fact presented here, declaratory judgment may be appropriately directed. (*Martin v. State Liquor Authority, supra.*)

The motion to dismiss the complaint is denied and judgment is directed in favor of the defendant declaring section

9 and section 7 subdv. 3(a) of ch. 531 of the Laws of 1964 to be, in all respects, constitutional and valid.

Plaintiffs' application for a preliminary injunction is denied.

Attorney for defendants to submit order.

All papers to the attorney for defendants for filing upon entry of the order herein.

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### **Appendix D**

#### **TEXT OF SECTIONS 7, 8 AND 9 Of CHAPTER 531 Of The LAWS OF 1964**

§ 7. Section one hundred one-b of such law, as added by chapter eight hundred ninety-nine of the laws of nineteen hundred forty-two, subdivision four thereof having been amended by chapter five hundred fifty-one of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§ 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund. 1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other induce-

ments to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person who sells liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality; (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement of any kind whatsoever, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price

to wholesalers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for

reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers.

(c) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state exclusively by such retailer.

4. Each such schedule shall be filed on or before the tenth day of each month on a date to be fixed by the authority, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licensees. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. All schedules filed shall be subject to public inspection, from the time that they are required to be made available for inspection by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by

licensees a copy of his filed schedules as then in effect. The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section.

5. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, on or before the tenth day after this act becomes a law, there shall be paid to the liquor authority by each manufacturer and wholesaler licensed under this chapter to sell to retailers liquors and/or wines, a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for each such licensee. A like sum shall be paid by each person hereafter applying for any such license or the renewal of any such license, and such sum shall accompany the application and the licensee fee prescribed by this chapter for such license or renewal as the case may be. In the event that any other law requires the payment of a fee by any such licensee or applicant as set forth in this section for schedule listing, then and in such event the total fee imposed by this section and such other law or laws on each such licensee shall not exceed in the aggregate a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for such license.

6. The authority may revoke, cancel or suspend any license issued pursuant to this chapter, and may recover (as provided in section one hundred twelve of this chapter) the penal sum of the bond filed by a licensee, or both, for any sale or purchase in violation of any of the provisions of this section or for making a false statement in any schedule filed pursuant to this section or for failing or refusing in any manner to comply with any of the provisions of this section.

§ 8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles



of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anticompetitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination.

§ 9. Subdivision three of section one hundred one-b of such law, as amended by section seven of this act, is hereby amended to add eight new paragraphs, to be paragraphs (d), (e), (f), (g), (h), (i), (j) and (k), to read as follows:

(d) There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner or such wholesaler designated as agent, or any related person, to any

wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.

(e) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.

(f) There shall be filed in connection with and when filed shall be deemed part of any schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such sched-

rule if the owner of the brand of liquor is not licensed by the authority, or by a related person, an affirmation duly verified by such brand owner or such wholesaler designated as agent that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner of such wholesaler designated as agent, or any related person, to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (f), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands.

(g) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month preceding the month in which such schedule is filed.

(h) In the event an affirmation with respect to any item of liquor is not filed within the time provided by this section, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of liquor, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule.

(i) In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer, as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d), (e), (f) and (g) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this paragraph, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon the gallon of liquor, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.

(j) Notwithstanding and in lieu of any other penalty provided in any other provisions of this chapter, any person who makes a false statement in any affirmation made and filed pursuant to paragraphs (d), (e), (f) or (g) of this subdivision shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than ten thousand dollars or by imprisonment in a county

jail or penitentiary for a term of not more than six months or by both such fine and imprisonment. Every affirmation made and filed pursuant to paragraphs (d), (e), (f) or (g) of this subdivision shall be deemed to have been made in every county in this state in which the brand of liquor is offered for sale under the terms of said schedule. The attorney general or any district attorney may prosecute any person charged with the commission of a violation of this paragraph. In any such prosecution by the attorney general, he may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties in respect of any such proceeding which the district attorney would otherwise be authorized or required to exercise or perform, and in such prosecution the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney general or his deputy or assistant so attending.

(k) Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the liquor authority may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.

OCT 15 1965

JOHN F. DAVIS, CLERK

No. 545

**Supreme Court of the United States**

OCTOBER TERM, 1965

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*  
*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,  
ROBERT E. DOYLE, constituting the State Liquor  
Authority, and LOUIS J. LEFKOWITZ, Attorney  
General of the State of New York,  
*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

**MEMORANDUM IN OPPOSITION TO  
APPELLEES' MOTION TO DISMISS**

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DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER  
C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE,  
constituting the State Liquor Authority, and LOUIS J.  
LEFKOWITZ, Attorney General of the State of New York,  
*Appellees.*

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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## MEMORANDUM IN OPPOSITION TO APPELLEES' MOTION TO DISMISS

Appellants will reply to several of the points made by appellees in their motion to dismiss this appeal which is being taken from the Court of Appeals of the State of New York.

### **Appellees' Statement of the Case is Inaccurate**

On page 3 of their motion to dismiss, appellees misstate the genesis of Section 9 of Ch. 531.



They say that the Moreland Act Commission found that prices to wholesalers and retailers in New York State were higher than like prices in other states and that because of this the Commission recommended that Section 9 of Chapter 531—the no higher than the lowest price section—be enacted in order to reduce prices in New York to a level comparable with prices in other states.

But this is not the fact. The Moreland Act Commission found that any higher prices in New York resulted from the fact that under old Section 101-c of the New York Alcoholic Beverage Control Law (hereinafter cited as the ABC Law) resale price maintenance was mandatory. The Commission recommended its repeal. This was achieved by Section 11 of Chapter 531, 1964 New York Session Laws.

The no higher than the lowest price provisions contained in Section 9 were never in any way recommended or suggested by the Moreland Act Commission nor were they enacted by the Legislature for the purpose claimed by appellees. In fact, far from recommending or suggesting its enactment, Judge Lawrence E. Walsh, Chairman of the Commission, suggested that such maximum price provisions might well be unconstitutional. As Section 8 of Chapter 531, reproduced in appellees' motion at pp. 48-49, clearly points out, Section 9 was enacted solely "to forestall possible monopolistic and anti-competitive practices" which might arise in the future.

To reiterate, Section 9 was not enacted for the purpose of reducing prices in New York to wholesalers and consumers. The repeal of Section 101-c was the measure enacted for this purpose; the repeal of that section is not challenged here. Section 9 was enacted to prevent restric-

tive pricing practices which might arise in the future but which neither the Legislature nor the Moreland Act Commission claimed existed before or at the time of passage of the Act.

**Appellees' Views on the Applicability of the Twenty-first Amendment and Violations of the Commerce Clause are in Error**

As appellants acknowledged in their Jurisdictional Statement, early cases of this Court seem to imply that the commerce clause must be restrictively applied to state statutes which affect the sale of alcoholic beverages only within the legislating state. See appellants' Jurisdictional Statement, pp. 24-25. But it does not follow from this, as appellees contend, that the commerce clause has been read out of the Constitution in so far as alcoholic beverages are concerned.

Appellees attempt to vitiate the impact of cases such as *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 24 (1964) and *Department of Revenue v. Beam Distilling Co.*, 377 U. S. 341 (1964). They quote general introductory statements of the opinions which merely reaffirm that a state is empowered to pass legislation having an impact solely within its own borders without regard to burdens upon interstate commerce. However, these quotations cannot detract from the significance of these two cases, for both recognize that the commerce clause is still applicable when alcoholic beverage legislation is at issue.

Furthermore, appellees choose to ignore the significance of the decisions of this Court in *United States v. Frankfort Distilleries*, 324 U. S. 293 (1945) and *Nippert v. City of Richmond*, 327 U. S. 416 (1946). It is understandable why

appellees have overlooked these cases, for they clearly contradict appellees' position as to the scope of the Twenty-first Amendment. Appellees also fail to meet appellants' demonstration of the immediate and substantial effect Section 9 of Ch. 531 will have upon the prices of alcoholic beverages in other states. As appellants pointed out, this alone is sufficient to distinguish the early cases construing the interrelationship between the Twenty-first Amendment and the commerce clause.

On page 7 of their motion, appellees go on to state that, even if the legislation in question were not sanctioned by the Twenty-first Amendment, the commerce clause would be no barrier to Section 9 of Ch. 531. Appellees then cite five cases, apparently in an effort to contradict the authority offered by appellants in their Jurisdictional Statement on pp. 39-44.

Not one of the five cases cited by appellees alleges a violation of the commerce clause, Article 1, Section 8, of the federal constitution. Each of these cases concerned a constitutional challenge based upon the Fourteenth Amendment and alleged either a deprivation of due process of law or a denial of the equal protection of the laws. Thus, appellees have yet to contradict the assertions of appellants' Jurisdictional Statement contained on pp. 39-44.

**Appellees' Misconception of the Purpose of Section 9 of Chapter 531 is Responsible for Their Position That the Sherman and Robinson-Patman Acts are Not Applicable in This Action**

On page 7 of their motion to dismiss, appellees state that the Sherman and Robinson-Patman Acts are "irrelative

[sic] to the statute here. Therefore there is no issue under the Supremacy Clause of the Constitution."

Appellees' first contention supporting the alleged irrelevance of these acts to the proceedings at issue is that Section 9 of Chapter 531 and the entire New York Alcoholic Beverage Control Law concerns only intrastate commerce. But appellees *ipse dixit* does not make it so. Appellants' Jurisdictional Statement fully documents the substantiality of the question.

Appellees next contend that such acts are irrelevant because "the statute does not act upon monopolistic or anti-competitive practices as does the Sherman Act. It is not an anti-monopoly statute."

Not only does Section 8 of Ch. 531 flatly contradict this assertion but, as we have shown in our Jurisdictional Statement, Section 9 of Chapter 531 has severe interstate consequences and seeks, to use appellees' phrase, to deter "monopolistic or anti-competitive practices, as does the Sherman Act." This is so because New York State is by far the largest liquor market in the country and the effect of Section 9, among other things, will be—as both the majority and minority opinions of the New York State Court of Appeals made clear—the raising of prices throughout the country rather than a reduction of prices in New York. This result must inevitably flow from a situation such as Section 9 presents, where a competitor is prevented from granting price differentials to customers throughout the country in a "good faith" attempt to meet competition without reducing his prices in New York.

The right to reduce prices under such circumstances is one of the essentials sought to be preserved by the federal

antitrust laws. The 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws, in its discussion of "The 'Good Faith' Meeting of Competition Defense", states at page 181:

Whatever the interpretation of the substantive price discrimination offense, we think that a seller's right to meet a competitor's prices by granting price differentials to some customers without reducing his prices to all must remain an essential qualification to any anti-price discrimination law. For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. As the Federal Trade Commission recently recommended to Congress, "the right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competitive economy." Anything less, we think, would move the price discrimination statute into irreconcilable conflict with the Sherman Act.

**Appellees' Contentions Concerning the Scope of the Due Process and Equal Protection Clauses are Inconclusive and Lack Substance**

Appellees' contentions concerning the scope of the due process and equal protection clauses of the Constitution are without substance. We reiterate that as Section 9 of Chapter 531 does not affirmatively promote temperance, it is a denial of due process of law to place maximum price limitations upon appellants' sales in New York. The promotion of temperance is the sole rationale for legislation restricting the sale of alcoholic beverages in the State of New York. See ABC Law, § 2. Section 2 in effect establishes the promotion of temperance as the due process,

police power standard for New York alcoholic beverage control legislation.

However, this maximum price legislation does not satisfy even a general substantive due process standard.

An examination of judicial precedent upholding maximum legislation shows that these cases break down into two categories. First there are the cases which deal with essential goods, *e.g.*, *Nebbia v. New York*, 291 U. S. 502 (1934). Then there are cases which uphold maximum price limitations because of industry abuses which can be corrected only by this device. See *Gold v. Di Carlo*, 235 F. Supp. 817 (S. D. N. Y.), *aff'd*, 380 U. S. 520 (1965). It is readily apparent that Section 9 of Ch. 531 fits neither of these categories.

If the entirety of appellees' constitutional argument is considered, it becomes clear that appellees believe members of the alcoholic beverage industry are bereft of the right to challenge state alcoholic beverage legislation on any constitutional ground. Members of this industry, appellees would submit, are for some unexplained reason not entitled to rely upon the constitutional guarantees available to those in other businesses. Appellees would have it believed that the Twenty-first Amendment removes any constitutional challenge, based upon either the commerce or supremacy clauses, to any state alcoholic beverage legislation.

Similarly, in considering whether any such legislation comports with due process standards, appellees would have judicial inquiry cease once it had been asserted that the state legislature passed the bill in the belief that it was acting for the benefit of society.

The acceptance of these positions, of course, would mean that there can be no meaningful judicial review of any state alcoholic beverage legislation. It does not follow that because constitutionally a state can entirely prohibit the sale of alcoholic beverages, it is free to impose the most onerous and unreasonable burdens upon industry members if it permits the sale of these beverages.

Appellees claim that this particular legislation benefits the general welfare solely because it will immediately result in lower prices to consumers in New York. Aside from the fact that this is neither the purpose nor the probable result of Section 9 (see pp. 2, 5, *supra*), it is submitted that this argument can be applied to legislation dealing with any commodity. If this argument as to the scope of power to legislate on behalf of the "general welfare" is accepted, then the due process clause can be no barrier to legislation similar in construction to Section 9 which fixes the maximum prices of automobiles, television sets and the like. Appellants submit that this type of legislation is yet to be deemed a proper exercise of a state's police power.

Likewise, appellees' argument that Section 9 of Ch. 531 does not deny appellants the equal protection of the laws begs the question. Appellees state that this clause of the Constitution does not require things which are different in fact to be treated in law as though they were the same. But this was not appellants' contention (see appellants' Jurisdictional Statement, pp. 60-62). Appellants contention was and is that there is no substantial difference between New York wholesalers who do an indeterminate amount of their business with a certain distiller and those New York wholesalers who do a lesser percentage of their business with the same distiller. Nevertheless, by the terms



of Section 9, the former are subject to limitations on their prices while the latter are free to set a price of their own choice.

### Conclusion

Probable jurisdiction should be noted in this case as it presents federal questions of sufficient substantiality to warrant review by this Court.

Respectfully submitted,

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Dated: October 13, 1965.

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JOHN F. DAVIS, CLERK

No. 545

**Supreme Court of the United States**

OCTOBER TERM, 1965

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*  
*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
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ROBERT E. DOYLE, constituting the State Liquor  
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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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# Supreme Court of the United States

OCTOBER TERM, 1965

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No. 545

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*  
*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART, WALTER  
C. SCHMIDT, BENJAMIN H. BALCOM, ROBERT E. DOYLE,  
constituting the State Liquor Authority, and LOUIS J.  
LEFKOWITZ, Attorney General of the State of New York,  
*Appellees.*

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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## BRIEF FOR APPELLANTS

### Opinions Below

The opinion of the Court of Appeals of the State of New York and the opinion of the three dissenting judges (R. 342) are reported in 16 N. Y. 2d 47, 209 N. E. 2d 85, 262 N. Y. S. 2d 453 (1965). The opinion of the New York Supreme Court, Appellate Division, Third Department (R. 337), is reported in 23 A. D. 2d 933, 259 N. Y. S. 2d 644 (1965). The opinion of the New York Supreme Court, Special Term, Albany County (R. 320), is reported in 45 Misc. 2d 956, 258 N. Y. S. 2d 442 (1965).

### **Jurisdiction**

The order of remittitur of the Court of Appeals for the State of New York (R. 355) was entered July 9, 1965. The notice of appeal to the Supreme Court of the United States (R. 359) was filed on July 23, 1965. Enforcement of the entirety of Section 9 and parts of Section 7 of Chapter 531, 1964 New York Session Laws was stayed by Chief Judge Charles Desmond, pending application for a stay to this Court. On August 5, 1965, Mr. Justice Harlan granted appellants' application for a stay, pending the determination of an appeal to this Court. Appellants' Jurisdictional Statement was filed on September 8, 1965. Probable jurisdiction was noted on November 22, 1965. The Jurisdiction of this Court is invoked under 28 U. S. C. § 1257(2).

### **Constitutional and Statutory Provisions Involved**

For some time manufacturers and wholesalers of distilled spirits have been required pursuant to statute to file a schedule of prices at which they will sell in New York during the immediately succeeding month with the State Liquor Authority. This practice is not challenged here. At issue in this action is the constitutionality of the entirety of Section 9 and parts of Section 7 of Chapter 531, 1964 New York Session Laws.<sup>1</sup>

Section 9 provides that the price schedules of all distillers and certain "related person" wholesalers selling in New York must be accompanied by a duly verified affirmation attesting that the schedule contains prices no higher than the lowest charged by these distillers or by independent "related person" wholesalers elsewhere in the United

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<sup>1</sup> Section 9 of Chapter 531, 1964 New York Session Laws, is also hereinafter cited as "Section 9 of Ch. 531" and "Section 9."

States during the immediately preceding month. Failure to file the affirmation will prevent both distillers and wholesalers from selling the brand in question in New York for at least a month. Filing a false affirmation, even innocently, can result in license revocation, penal sentences and severe fines to the erring distiller.

In order to understand the rationale of this maximum pricing legislation, it is necessary to examine Section 8 of Chapter 531, which states the legislative purpose underlying Section 9. The text of Chapter 531, 1964 New York Session Laws, with the challenged sections appropriately indicated, is set forth in Appendix A. A discussion of the effect of Section 9 is found *infra*, pp. 9-13.

Section 7 of Chapter 531, 1964 New York Session Laws, has added new conditions to the basic price filing requirements. Section 7 of Chapter 531 now prohibits a New York wholesaler from purchasing distilled spirits from a manufacturer unless that manufacturer has filed a schedule with the State Liquor Authority listing the prices at which the manufacturer sold to wholesalers "irrespective of the place of sale or delivery" of such liquor. Similarly, retailers may not purchase from wholesalers unless the wholesaler has filed such a schedule. Furthermore, the price schedules relating to distiller to wholesaler and wholesaler to retailer sales must now include "the net bottle and case price paid by the seller."

The constitutional provisions and federal statutes involved are also set forth in Appendix A at pp. A-1 through A-4.

### Questions Presented

1. Does the Twenty-first Amendment to the Constitution of the United States permit the New York State Legis-



lature to enact laws which levy their primary economic burden on the operations of the alcoholic beverage industry in other states and which were not enacted to regulate any social problems arising from the use of these beverages?

2. Does Section 9 of Ch. 531, in conflict with the terms and policies of the Robinson-Patman and Sherman Acts, violate Article 6 of the Constitution of the United States?

3. Does Section 9 of Ch. 531, by requiring appellants to price in New York in accordance with a standard based upon their lowest prices elsewhere in the nation and upon the lowest prices charged by independent wholesalers in other states, violate Article 1, Section 8 of the Constitution of the United States?

4. Does Section 9 of Ch. 531, having no relation to a legitimate police power aim, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

5. Does Section 9 of Ch. 531, which limits the maximum price New York "related person" wholesalers may charge for alcoholic beverages to the lowest price a wholesaler in any other state charged during the immediately preceding month while permitting other New York wholesalers to charge any price they choose, violate the equal protection clause of the Fourteenth Amendment to the Constitution of the United States?

6. Do certain parts of Section 7 of Ch. 531 also violate these constitutional guarantees?

### **Statement**

Appellants shall describe the parties to this action and shall attempt to present a concise summary of relevant

sections of the New York State Alcoholic Beverage Control Law (hereinafter cited as the "ABC Law") prior to passage of the challenged sections. Only by an examination of the philosophy underlying the entire ABC Law and the reasons for the passage of Section 9 of Chapter 531, 1964 New York Session Laws, can a true understanding of the impact of Section 9 be attained.

#### **A. The Parties.**

Appellants are distillers (manufacturers), wholesalers and importers of branded distilled spirits.

Appellant-distillers sell their products, where permitted, throughout the United States and in many foreign countries. They include the great majority of the producers of distilled liquor who sell to wholesalers and, in some cases, retailers in New York. In addition certain distillers are United States importers and distributors for distilled spirits produced in foreign countries. Distillers who are qualified to do business in New York generally possess either a distiller's or a wholesaler's license as described in Section 61 and 62 of the ABC Law. Those not qualified to do business in New York sell to duly licensed wholesalers, some of whom act as agents for distillers in filing distiller-to-wholesaler price schedules as required by Section 101-b-3(a) of the ABC Law. Those distillers possessing licenses generally file their own price schedules.

Appellant-wholesalers conduct a large amount of the annual dollar volume of wholesale distilled spirits sales in New York. While the majority of these wholesalers are independent New York concerns, others are nationwide parent companies which own wholesale liquor outlets in New York and several other states. Every appellant-wholesaler possesses a New York wholesaler's license.

Appellant-importers purchase distilled spirits from foreign manufacturers and sell to wholesalers and retailers throughout the United States and in New York under authority of New York wholesaler's licenses.

Appellees are Donald S. Hostetter *et al.*, Chairman, and members of the State Liquor Authority, the body charged with administering the ABC Law and empowered to revoke distillers' and wholesalers' licenses for violations thereof and the Attorney General of the State of New York, Louis J. Lefkowitz, whose office is authorized to prosecute criminal proceedings for violations of Section 101-b, as amended, of the ABC Law.

#### **B. The Law Concerning Liquor Prices Prior to Ch. 531.**

Section 101-b of the ABC Law was enacted in 1942 to promote temperance by preventing undue stimulation of sales of alcoholic beverages arising from the granting of discounts, rebates, allowances, and free goods to "selected licensees" by certain manufacturers and wholesalers.

Generally, Section 101-b prohibits distillers and wholesalers from discriminating between like situated customers (1) in price, (2) in discounts for time of payment or (3) in quantity of merchandise. Thus, a distiller must offer the same base price and the same discounts to all those New York wholesalers to whom he sells. Similarly, New York wholesalers must offer the same base price and the same percentage discounts to all their retail customers.

Except for a maximum 2 per cent quantity discount and a 1 per cent discount for payment on or before 10 days from date of shipment, distillers and wholesalers of distilled spirits are prohibited from granting directly or indirectly "any discount, rebate, free goods, allowance or other inducement." ABC Law, Section 101-b-2(b).

To implement these restrictions, Section 101-b-3(a) requires a schedule to be filed monthly by the owner of a brand of liquor, or a wholesaler designated as agent by the owner. The schedule is required to list the bottle and case price to wholesalers plus such information as the brand or trade name, capacity of package, nature of contents, and the age and proof where stated on the label.

A similar schedule of prices and general information is required to be filed by any manufacturer or wholesaler selling the brand in question to retailers.

Likewise, Section 101-c of the ABC Law was enacted in 1950 to promote temperance by eliminating price wars "which unduly stimulate the sale and consumption of liquor and wine. . . ." This section prohibited sales of liquor and wine at retail until the owner of a brand of liquor or wine, his designated wholesale agent, or any wholesaler approved by the State Liquor Authority filed a schedule with the Authority listing the minimum price at which the particular brand could be sold to the consumer. The mandatory resale price maintenance section was enforced by the State Liquor Authority, unlike the ordinary State "fair trade" law which is enforced by private action.

To these restrictions on the right to set one's prices in response to free market conditions at the distiller and wholesaler levels, were grafted the provisions of Sections 7 and 9, Chapter 531, 1964 New York Session Laws, in April 1964.

#### **C. Events Preceding 1964 Legislation to Amend the Alcoholic Beverage Control Law.**

In his annual message to the Legislature on January 9, 1963, Governor Nelson A. Rockefeller announced the ap-

pointment of a Moreland Act Commission to undertake a study of the State Liquor Authority's administrative structure, practices and procedures. This Commission, composed of distinguished citizens, made several studies and held a number of hearings in its efforts to become acquainted with the conduct of the alcoholic beverage industry in New York.

After taking voluminous testimony, the Moreland Act Commission concluded that Section 101-c was directly responsible for the occurrence of higher retail liquor prices in New York than in other states. It reasoned that mandatory resale price maintenance tends to thwart the price competition which exists in a normal, vigorously competitive market. The recommendation of the Commission was to the point:

Section 101-c of the ABC Law, which provides for SLA enforcement of minimum consumer resale prices fixed by the distillers, should be repealed.

(Moreland Commission to Study the Alcoholic Beverage Control Law, Study Paper No. 3 (R. 157).)

The studies of the Commission call for a free competitive market in distilled spirits. At no time did the Commission advocate the maximum price controls embodied in the amendments to Section 101-b which are the subject of this action. The Commission called for the repeal of state enforced retail price maintenance because it felt this artificial price support was responsible for a higher retail liquor price in New York. It believed that after repeal of mandatory retail price maintenance the competition inherent in a free market could be counted upon to give a fair market price to New Yorkers. The Commission did not believe, contrary to the philosophy underlying old Section

101-c of the ABC Law, that high retail liquor prices serve to promote temperance, the sole rationale for legislative regulation of liquor in New York.

#### **D. The New Act.**

In accordance with the recommendations of the Moreland Act Commission, Section 101-c of the ABC Law, the mandatory retail price maintenance section, was repealed by Section 11 of Ch. 531.

The rationale for the repeal of Section 101-c is contained in Section 8 of Ch. 531, which states that "fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor" in New York. Section 8 further states that New York consumers of alcoholic beverages should not be discriminated against by paying "unjustifiably higher" prices for brands of liquor than are "paid by consumers in other states." Section 8 maintains that "price discrimination and favoritism are contrary to the best interest and welfare of the people of this state." It continues by stating the belief that enactment of Section 11, repealing mandatory resale price maintenance, "will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state." Section 8 then goes on to assert the legislative conclusion that it is necessary to enact the maximum price provisions of Section 9 of Ch. 531 which are the subject of this appeal "in order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage."

Contrary to the repeated assertions of appellees and the opinion of the majority below, the repeal of mandatory resale price maintenance is not challenged by this appeal.

Section 9 of Ch. 531 adds eight paragraphs to Section 101-b-3 of the ABC Law. These are paragraphs (d)-(k). Paragraphs (d)-(g) of Section 9 place maximum price restrictions upon the sale of non-private label liquors in New York. Under paragraph (d) every schedule of prices to be charged wholesalers during the immediately succeeding month, required by Section 101-b-3(a), must now in effect list prices that are "no higher than the lowest price" given by the brand owner, a wholesaler designated as his agent or by a "related person" to any wholesaler elsewhere in the United States during the immediately preceding month. This is so because an affirmation verified by the party filing the basic schedule and stating that the prices in the schedule are no higher than the lowest charged elsewhere must accompany each such schedule. See ABC Law, Section 101-b-3(d) and (e). As noted, the price filed will be the price at which the item must be sold during the immediately succeeding month. Thus, for example, the lowest January price charged outside New York would be filed in the New York price schedule in February and would be the actual New York price in March.

The term "related person" is defined as any person in whose business the brand owner has a direct or indirect interest. It also means any person whose "exclusive, principal or substantial business" is the sale of a brand or brands of liquor "purchased from such brand owner or wholesaler designated as agent." A related person also includes one who has "an exclusive franchise or contract to sell such brand or brands." ABC Law, Section 101-b-3(d) and (f).

Pursuant to paragraph (f) a brand owner or wholesaler designated as agent by the brand owner must af-



firm that the prices listed in the basic schedule of prices to New York retailers filed by New York wholesalers are no higher than the lowest price at which such item of liquor was sold by the brand owner, the wholesaler designated as his agent, or *any* "related person" doing business anywhere else in the nation to any retailer, exclusive of state retail agencies, elsewhere in the United States during the immediately preceding month.

Similarly, a wholesaler who is somehow determined to be a person "related" to a brand owner may not sell to New York retailers unless the brand owner or his agent affirms that the wholesaler's New York price schedule contains prices no higher than the lowest charged retailers elsewhere in the United States by the brand owner, his agents, or any person selling to retailers anywhere else in the nation who is "related" to the brand owner or his agents.

The definition of a "related person" in paragraph (f) is virtually the same as that in paragraph (d).

If a New York wholesaler is willing to attest that he is not a "related person", he may file a price schedule and affirmation containing a price of his own choosing, if his sales are confined to New York State only. However, should a non-related person wholesaler sell in any other state, he must affirm that his New York price is no higher than the price at which he sold in the other state.

Should an appropriate affirmation of a price no higher than the lowest granted elsewhere not be filed as required, paragraph (h) prohibits the sale of such item during the period covered by the price schedule in question.

Before a brand owner affirms that the price contained in a particular schedule is no higher than the lowest granted

elsewhere, he is required by paragraph (i) to make "appropriate reductions" for all "discounts in excess of those to be in effect under such schedule [the maximum 2 per cent quantity and 1 per cent time discount], and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer" purchasing the item elsewhere in the United States. Thus the lowest "price" which must be accorded to New York wholesalers and retailers is a "net" price reflecting all the above-described deductions which are offered or given to purchasers in other states. Excluded from such "appropriate reductions" are differentials which reflect differences in state taxes and fees and "the actual cost of delivery." Paragraph (i) defines state taxes and fees as "excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon a gallon of liquor, and the term 'gallon' shall mean one hundred and twenty-eight fluid ounces."

A person making a false statement in any affirmation filed pursuant to paragraphs (d)-(g) will be deemed guilty of a misdemeanor pursuant to paragraph (j) of Section 9. Upon conviction, the maximum penalty will be a fine of \$10,000 or imprisonment for a term of not more than 6 months or both. Pursuant to Section 7, paragraph 6 of Ch. 531, a company whose prices are improperly affirmed can lose its New York license and forfeit its bond.

By paragraph (k) a person convicted in accordance with paragraph (j) may not be able to affirm a price schedule for up to three months, at the discretion of the State Liquor Authority.

To summarize the significant changes in the amendments to Section 101-b-3 which are the subject of this

appeal: (1) those selling to wholesalers and certain wholesalers selling to retailers cannot sell to their customers until the brand owner affirms that the price to wholesalers and retailers quoted for an item of liquor (an item includes each separate bottle size of each brand) in the price schedules is no higher than the lowest price at which the item was sold elsewhere in the United States during the immediately preceding month by the brand owner or a person "related" to the brand owner; (2) these prices must reflect all allowances, discounts and other inducements given elsewhere to any wholesaler or retailer in the United States; (3) if the brand owner fails to file the affirmation, neither he nor the independent "related person" wholesalers of that brand may sell it in New York for the period of the price schedule—one month; (4) the new amendments are penal in nature, and one making any false statement in the affirmation is subject to prosecution for a misdemeanor and possible revocation of his license to sell in New York.

Section 101-c of the preexisting ABC Law is repealed and there is no longer any mandatory resale price maintenance covering liquor in New York. As with the basic price schedules of Section 101-b-2 and 3, the no higher than the lowest price provisions do not apply to brands of liquor that are owned exclusively by a single retailer.

#### **E. Appellants' Operational and Pricing Structure.**

Generally, distilled spirits are marketed under trade or brand names owned by the distiller, his designee or a foreign manufacturer, although some are marketed by wholesalers and retailers using their own "private labels."

The bulk of appellant-distillers' merchandise is marketed in the several states through independent wholesalers

not having an exclusive franchise (R. 205). These wholesalers are under no legal compulsion to inform a distiller of the price at which they sell to retailers (R. 300, 303, 305).

Certain appellant-wholesalers conduct a nationwide wholesale business selling the brands of appellant-distillers and their own brands. However, the majority of appellant-wholesalers are independent New York merchants who conduct their operations only within the State of New York.

Due to varying regulations in each state affecting excise tax levels and conditions of sale, market limits in the distilled spirits industry are conterminous with state geographical boundaries (R. 245). Mississippi is the only completely dry state in the Union. Thus, there are at least fifty distinct market areas when the District of Columbia is included. However, within each market there exists a high degree of competition between different brands within the same generic type of liquor and, more broadly, between the generic types themselves (R. 245). An individual distiller may sell as many as 150 brands of various types of liquor within one market. These brands are sold in several different bottle sizes. Each brand may face a different competitive situation in each market. Seasonal variations in drinking habits and consumer demand affect, as in many other commodities, the net price which the product can command at any given time in any given market. Similarly, regional competition in the form of private labels and popular local brands have the result of temporarily affecting the price of a nationally known brand (R. 227).

New York sales account for some 12% of the national consumption of distilled spirits (R. 241).

• Private label liquor sales account for 12% of the total sales of New York retailers carrying such brands. Yet the

prices at which retailers purchase these labels are not required to be posted nor does the ABC Law impose maximum price limitations upon these brands at any merchandising level.

In any determination of price, whether at the distiller or wholesaler levels, the element of cost is a primary consideration. Currently, Metropolitan New York wholesalers operate on one of the lowest levels of profit in the country. On the average they realize less than one per cent net profit on their net sales before taxes (R. 247). This is largely because their net operating expenses average 10.88% of net sales (R. 247). In 1963 upstate New York wholesalers averaged a net profit of .66% on their net sales before taxes. Their operating expenses averaged 11.5% of net sales (R. 247). These expense figures are among the highest in the nation. The national figures for firms of comparable sales volume are: operating expenses 9.87% of net sales and before-tax profits 1.42% (R. 247). This profit figure is roughly double that of reporting New York firms. As an example of contrast, Florida wholesalers in 1963 had operating expenses of only 7.34% of net sales and profits of 1.52%. Other large metropolitan centers such as St. Louis and Chicago had figures better than the national average (R. 247). The maximum price provisions in the 1964 amendments to Section 101-b do not make allowance for these differences in the cost of doing business.

Nor have distillers realized an excessively high rate of profit at the expense of New York consumers. The actual facts reflect a different situation. Of the 65 industries analyzed in 1963 by the First National City Bank, the distilling industry ranked 53rd in percent of return on invest-

ment, behind such others as automobiles, soft drinks, drugs and medicines (R. 244).

#### **F. Opinions Below.**

Four judges of the Court of Appeals of the State of New York voted to affirm the judgment of the Supreme Court, Special Term, which was affirmed by the Supreme Court, Appellate Division, Third Department, holding that the Twenty-first Amendment to the Constitution of the United States shielded the challenged sections of Chapter 531 from an attack based upon violations of other sections of the federal constitution. To the majority of the Court of Appeals, the ability of the State to prohibit entirely the traffic in liquor *ipso facto* allows the legislature, once it decides to permit the sale of distilled spirits, to regulate the industry in any manner it sees fit, without regard to federal constitutional guarantees.

The majority found that even though the effect of Section 9 of Ch. 531 is to force appellants to tie their prices in New York to those prevailing in other states, there is no resulting interference with interstate commerce (R. 346). The majority went on to say that if the effect of Section 9 of Chapter 531 "on New York is too low a price they have it within their power to raise the lowest price elsewhere" (R. 346). The majority cited opinions of this Court rendered shortly after ratification of the Twenty-first Amendment to the Constitution of the United States for the proposition that the commerce clause, Article 1, Section 8 of the Constitution of the United States, is no longer applicable to the distilled spirits industry.

Nor did the majority of the Court of Appeals feel that Section 9 violates the supremacy clause of the federal con-

stitution, Article VI, because of conflict with the federal Sherman and Robinson-Patman Acts. The majority opinion took the view, notwithstanding the anti-trust purpose of Section 9 clearly stated in Section 8, that Section 9 cannot be "transformed" into an antitrust measure (R. 349).

Three judges of the Court of Appeals stated that while a state is indeed empowered to prohibit the sale of distilled spirits entirely, if it chooses to allow the industry to operate it must do so in a constitutional manner. The dissenting judges chose to set forth at length the reasons why Section 9 of Chapter 531 is not a valid function of the State's police power. However, in his opinion Chief Judge Desmond emphasized that he was not overlooking "a number of other troublesome aspects of these amendments", even though the dissenting opinion failed to discuss them at length (R. 354).

The decision of the majority of the Court of Appeals betrays these fundamental faults:

1. It assumes that the Twenty-first Amendment to the federal constitution has rendered the commerce clause a dead-letter in the area of alcoholic beverages and permits the states to control the alcoholic beverage industry in a way which has a real and marked effect on the conduct of the industry in other states.

2. While not willing to state that the Twenty-first Amendment to the federal constitution can sustain a state act in conflict with a federal act and thus violate Article VI of the Constitution, the majority opinion failed to recognize the sharp conflict of Section 9 of Chapter 531 with federal antitrust acts.



3. In reasoning from the premise that the power to prohibit intoxicating liquor includes the power to regulate arbitrarily if sale is permitted, the majority of the Court of Appeals fell into a logical fallacy which prevented it from realizing that the state has a legal obligation, once it permits alcoholic beverages to be sold within the state, to regulate traffic in this commodity in accordance with constitutional standards.

## SUMMARY OF ARGUMENT

### I

By Sections 8 and 9 of Ch. 531 the state has attempted to prevent possible future anti-competitive practices by requiring distillers and certain wholesalers in New York to sell at prices no higher than the lowest prices charged to wholesalers and retailers elsewhere in the United States.

A brand name liquor which is sold in other states cannot be sold in New York until a distiller has gathered information as to his prices in other states and the prices of "related person" wholesalers selling the same brand elsewhere in the United States.

However, the court below ruled that the Twenty-first Amendment to the Constitution of the United States insulates Section 9 of Ch. 531 from the charge that it violates other federal constitutional guarantees because Section 9 was said by the majority below to have no effect on appellants' operations outside New York.

Yet at the same time the entirety of the court below recognized that its impact might well extend into other states in at least one instance in that a major economic effect of the New York statute may well be the imposition of artificially higher prices in other states, in order to enable

appellants to continue to do business in the high-cost New York market.

The Twenty-first Amendment to the federal constitution does not give a state plenary power to affect directly the operations of members of the alcoholic beverage industry in other states. *United States v. Frankfort Distilleries*, 324 U. S. 293, 299 (1945).

Early decisions of this Court such as *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59 (1936) and *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395 (1939) cannot serve to protect state legislation having these grievous interstate consequences. None of those cases involved statutes having the slightest price or marketing impact in other states. Nor did the Court in those cases have before it an attempt by a state to seize upon its economic power to force the alcoholic beverage industry to price in the legislating state at a level having no relation to competitive market prices.

None of the statutes in the early cases represented an attempt to control possible anti-competitive tendencies. And they did not require the objects of the legislation to undertake private action in other states violative of the terms and policies of the Robinson-Patman and Sherman Acts. Section 9, having this effect, is clearly distinguishable from the statutes at issue in the early cases.

The Twenty-first Amendment and the commerce clause of the federal constitution must be read concurrently. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964). The Twenty-first Amendment cannot protect state alcoholic beverage legislation when it is in conflict with federal laws governing interstate trade or traffic. *Department of Revenue v. James B. Beam Distilling Co.*, 377

U. S. 341 (1964). See *Nippert v. City of Richmond*, 327 U. S. 416 (1946).

## II

Section 9 of Ch. 531 is in direct contradiction with the terms of the Robinson-Patman Act, 15 U. S. C., §§ 13(a)-(f), 21(a) (1949). By the same token, Section 9 denies appellants the right to engage in certain business practices which are permitted by that Act. For example, Section 9 assumes that a geographical price differential is an inherently anti-competitive act and requires distillers to correct the situation by lowering their New York prices if they are currently higher than those elsewhere in the country. The Robinson-Patman Act, on the contrary, does not consider geographical price differentials anti-competitive absent a showing of lessened competition between sellers or buyers as a result of the differential. See *F. T. C. v. Anheuser-Busch, Inc.*, 363 U. S. 536 (1960).

Section 2(b) of the Robinson-Patman Act permits a seller to differentiate in price between customers if the seller is making a good faith effort to meet an equally low price of a competitor. However, this defense is not available to a charge under Section 9 of Ch. 531 that a lower price exists elsewhere in the United States for a brand sold in New York.

These are only two examples of how Section 9 is inalterably in conflict with that Act. Such conflict is a direct violation of the supremacy clause, Article VI, of the federal constitution. *Franklin Nat'l Bank v. New York*, 347 U. S. 373 (1954).

However, Section 9 of Ch. 531 also does violence to the terms and policy of the Sherman Act, 15 U. S. C., §§ 1-7

(1959). To comply with Section 9, distillers must obtain price information for any given month from their agents and from independent "related person" wholesalers elsewhere in the country, in order to have even the slightest chance of filing accurate affirmations in New York as to their prices and those of "related person" wholesalers. This type of exchange of price information from "related person" wholesalers in other states to the distillers and their New York wholesalers cannot help but be actively condemned by the Sherman Act. Compare *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960), with *United States v. Colgate & Co.*, 250 U. S. 300 (1919).

The Sherman Act establishes a policy of economic liberty and seeks free competition in interstate commerce. Mr. Justice Black referred to it as "a charter of economic liberty." *Northern Pacific Railway Co. v. United States*, 356 U. S. 1, 4 (1958). Section 9 can only be viewed as an unjustifiable attempt at economic restraint contrary to Sherman Act policy.

The supremacy clause permits no balancing of interest test and no weighing of conflicting policies. Once it is discovered that a state act is in conflict with the terms of federal acts, the state act must be struck down.

### III

Section 9 of Ch. 531 attempts to impose a special type of antitrust regulation on a single industry. In so doing, Section 9 is clearly inimical to federal antitrust policy which covers all lines of commerce. In its attempt to so control the alcoholic beverage industry, Section 9 reaches across state boundaries and has real and substantial effects on the conduct of this industry in the remainder of the Union.

Any tendency of the alcoholic beverage industry to price in an anti-competitive fashion is a concern of the federal government and is not a problem local in character. The unique antitrust legislation embodied in Section 9 must have a severe disruptive effect upon federal policy if upheld in this action and if other states seize what would become an opportunity to fashion their own individual concepts as to proper antitrust policy for this or any other industry.

The commerce clause does not permit a state to legislate in a manner disruptive of federal policy nor in a way that would expose citizens to conflicting legislation in other states. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945).

Nor can New York use its position as the leading market for alcoholic beverages in the country to force distillers and wholesalers into accommodating it with unreasonable prices. This legislative attempt to exact economic advantage in favor of New York purchasers in exchange for the right to sell goods in the largest market in the nation is patently contradictory of the commerce clause. *Hood & Sons, Inc. v. Du Mond*, 336 U. S. 525 (1949); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935).

#### IV

Both appellees and the majority of the court below have indulged in the misapprehension that Section 9 of Ch. 531 was enacted for the purpose of reducing prices in New York to wholesalers and consumers. They have further indicated the belief that these no higher than the lowest price pro-

visions were found to be necessary, if reasonable liquor prices are to prevail within the state, by the Moreland Act Commission charged with studying the alcoholic beverage industry in New York.

This view ignores the plain meaning of Section 8 of Ch. 531, which states that Section 9 was not enacted for the purpose of reducing prices in New York to wholesalers and consumers. The repeal of Section 101-c was the measure enacted for this purpose and the only action in this area called for by the Moreland Act Commission. The repeal of Section 101-c has never been challenged by appellants.

Section 8 makes it clear that Section 9 was enacted solely "to forestall possible monopolistic and anti-competitive practices" which might arise in the future. Neither the Legislature nor the Moreland Act Commission claims these practices existed before or at the time of passage of Section 9 nor is there any statement indicating that the rise of these practices was deemed imminent.

Section 9 of Ch. 531 serves no valid police power purpose. According to Section 2 of the New York Alcoholic Beverage Control Law, the sole rationale for legislative restriction on the right to sell alcoholic beverages in New York is the affirmative promotion of temperance. While the Moreland Act Commission disputed the contention that high prices serve to promote temperance, no one has had the temerity to claim that artificially low prices will also serve to reduce the social ills which may result from excessive use of alcoholic beverages.

While this Court has in recent years been reluctant to strike state statutes on substantive due process grounds, it has on several occasions repeated that state legislation

must fall if no demonstrable police power purpose is served. See *Goldblatt v. Town of Hempstead*, 369 U. S. 590 (1962); *Williamson v. Lee Optical Co.*, 348 U. S. 483 (1955). Section 9 of Ch. 531, either by the standards established by Section 2 of the ABC Law or by the general police power doctrine, fails to satisfy a substantive due process standard.

The definition of a "related person" in Section 9 of Ch. 531, vital in determining which New York wholesalers must sell at a price no higher than the lowest price charged by wholesalers elsewhere in the country, is intolerably vague by standards established by this Court in cases such as *Winters v. New York*, 333 U. S. 507 (1948). In this statute, which assesses criminal and civil penalties for failure to make a proper affirmation, a "related person" is one who does a "substantial" part of his business with a particular distiller. Distillers have no way of determining which of the approximately one thousand licensed wholesalers operating in the United States are to be considered "related" to them in such a manner as to require the distillers to obtain price information from these wholesalers. Nor do New York wholesalers have any means to determine if they are "related" to one from whom they purchase individual brands of alcoholic beverages.

## V

By applying the no higher than the lowest price standards to only certain New York wholesalers and allowing others to sell at a price of their own choosing, Section 9 of Ch. 531 makes a discriminatory classification which is forbidden by the equal protection clause of the Fourteenth Amendment. There is no generic difference between whole-



salers who must comply with the law and those free to set their own prices.

It is only those wholesalers who do a "substantial" part of their business with a particular distiller that are affected by the Act, while those who are not deemed to be included within this standard are free from its restrictions. Legislation cannot constitutionally discriminate in its application between those in a group having definite attributes of identity and no substantial differences. See *Reynolds v. Sims*, 377 U. S. 533 (1964).

## VI

Section 7 of Ch. 531 has no relation to the avowed legislative purpose of forestalling possible future antimonopoly practices, and it is thus capricious and constitutionally unreasonable.

## ARGUMENT

### POINT I

**The Twenty-first Amendment to the Constitution of the United States does not validate a New York statute which levies an economic burden on the operations of the distilled spirits industry in other states and which does not promote temperance or check evils peculiar to the trade in alcoholic beverages in New York.**

Section 2 of the Twenty-first Amendment to the Constitution of the United States proclaims:

The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. Ratified December 5, 1933.

The Twenty-first Amendment was not proposed or adopted in a historical vacuum. In abandoning prohibition as a national policy, Congress sought to embody in Section 2 of the Twenty-first Amendment, as constitutional policy, the principles of pre-prohibition statutory enactments such as the Webb-Kenyon Act, 37 Stat. 699. See 76 Cong. Rec. 4170 (1933); *id.* at 4141.

Nothing in the Amendment, its historical background, nor in fundamental principles of constitutional law can support the thesis that it permits a state to override constitutional guarantees by legislative action not necessary to effectuate state internal policy regarding the exercise of police power over the traffic in intoxicating liquor within its borders. New York may not pervert the Twenty-first Amendment by using it as a cloak for legislation contradictory to federal antitrust policy and burdensome upon operation of the alcoholic beverage industry in other states.

A major case concerning the Amendment realized that it "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries." *United States v. Frankfort Distilleries*, 324 U. S. 293, 299 (1945).

The opinion below of the Court of Appeals concluded that, regardless of whether Section 9 of Ch. 531 is an illegal burden on interstate commerce, it is protected by the Twenty-first Amendment because Section 9 does not affect appellants' operations outside New York.

An examination of some of the undeniable effects of Section 9 on appellants' operations in other states and on the administration of alcoholic beverage control laws in these states will illustrate the error of the court below.

The uncontroverted facts in this case show that the cost of doing business in New York for distillers and wholesalers is among the highest in the country. See p. 15, *supra*. The sale of alcoholic beverages in New York accounts for approximately 12% of the nation's total. See p. 14, *supra*.

If all prices in New York State were limited to the lowest price charged in any single sale in the low-cost states—as mandated by the statute—many New York wholesalers would be forced out of business unless distillers could somehow force “related person” wholesalers in other states to charge their customers artificially high prices. Similarly, distillers will have to ignore lower selling expenses in other states and sell at artificially high prices in other states or else sell at a loss in New York.

Thus one of the actual major economic effects of the New York statute may well be the imposition of artificially higher prices in other states at rates which will enable each of the distillers and wholesalers to continue to do business in New York State. This fact was recognized by the entirety of the Court of Appeals (R. 347, 354). This probable effect on business and commerce in other states is not merely incidental to a valid regulation of prices for sales within New York State—it is a major economic effect of the legislation.

Similarly, a producer, nationwide wholesaler or importer of branded distilled spirits selling in the largest market in the nation will not be free to determine his price in response to competitive situations in other markets without determining the effect such price will have on his New York market. Contracts of sale in other states will be negotiated with concern as to their effect on the

New York price structure. One will certainly be loath to grant temporarily a promotional discount on 100 cases of his product in, say, Arizona to meet a local competitive condition if he will be required to grant the same discount on the sale of 10,000 cases in New York.

Likewise, distillers wishing to sell to New York "related person" wholesalers must affirm that the prices at which these wholesalers sell to New York retailers are no higher than the lowest prices at which "related person" wholesalers in other states sold to retailers elsewhere in the United States during the immediately preceding month. To make this affirmation distillers will have to secure price information from "related person" wholesalers in other states and insist upon the filing of the lowest of these prices by New York wholesalers who come within the "related person" definition. Section 9 puts the distiller in the position of risking a Sherman Act prosecution by collecting and disseminating this information and acting as a conduit for what amounts to a price agreement between certain New York wholesalers and the wholesaler who sells the particular brand at the lowest price elsewhere in the United States during a particular month. *Cf. American Column & Lumber Co. v. United States*, 257 U. S. 377 (1921). It can also be said that the distiller, by refusing to affirm the price schedule of a New York wholesaler who lists prices higher than the lowest collected by the distillers from wholesalers around the country, is engaging in conduct prohibited by the Sherman Act. See pp. 44-46, *infra*.

Of course this gathering of price information made necessary by Section 9, which may lead to Sherman Act prosecutions, will be conducted outside of New York and thus clearly transcend the limits of the Twenty-first Amend-

ment set forth in *Frankfort Distilleries, supra*. Assuming *arguendo* that the state is permitted by the Twenty-first Amendment to burden interstate commerce virtually as it pleases *within the boundaries of the state*, *Frankfort* makes it clear that the Twenty-first Amendment will not allow a state to enact liquor legislation which leaves a distiller no choice but to violate basic federal antitrust laws *in another state* if he is to comply with the state act. When a state does so "it demands private conduct which the Sherman Act forbids." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 389 (1951).

So, too, Section 9 will impose upon other state liquor legislation. For example a California regulation allowed wholesalers to grant a maximum 8% discount for quantity purchases but, like many other states, placed no restrictions on discounts offered by distillers. See Chapter 1, Title 4, California Administrative Code, Rule 100(1). New York only allows a 2% liquor quantity discount, but by the terms of Section 101-b-3(i), any discount in excess of 2% accorded elsewhere must be given to New York purchasers. Would distillers be willing to grant California purchasers discounts in excess of 2% if that would affect their New York prices? Would not Section 101-b-3(i) have the practical effect of negating the California rule? A seller in California would be required to weigh any decision to grant a discount in excess of 2% by the effect this would have on his profits in New York as well as California.

Thus, from what has been said above, it is evident that the primary economic impact of Section 9 will fall upon industry operations without the borders of New York. Only when pricing policies and reporting procedures are established in other states will Section 9 have

any effect on operations in New York. New York will not experience the economic impact of this section on prices until some two months after the prices are charged in other states. Section 9 basically requires only one act for compliance: the affirmation of their own and "related person" wholesaler price schedules. But before this single act of compliance can be executed with the slightest degree of security, distillers must engage in price gathering and reporting activities in other states. The federal constitution does not allow one state to interfere with commerce in and among the other states in this manner, see p. 50, *infra*, and the Twenty-first Amendment has never been said to sanction such legislation.

It is true that early decisions of this Court cited by the majority below appeared to state that the commerce clause in particular and perhaps other sections of the federal constitution in general are virtual dead letters when alcoholic beverage regulation is at issue. These cases generally allowed discriminatory charges and other burdens to be imposed upon out of state alcoholic beverages and also allowed one state to place these burdens on the alcoholic beverages brought in from a second state while allowing these beverages to be imported without discriminatory treatment when introduced from a third state. See, *e.g.*, *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U. S. 391 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401 (1938); *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59 (1936).

However, none of the statutes at issue in these cases required a prior act in another state by industry members as a condition of compliance with the challenged legislation. None of the statutes were claimed to have had the slightest

price or marketing impact in other states. And not one of these states seized upon its economic power to force businesses operating in interstate commerce to price at a level having no regard for the economics of the market in the legislating state.

The statutes in these cases were concerned mainly with protecting a local industry through the imposition of obstacles on out of state producers. Whether this was a goal which should have been protected by the Twenty-first Amendment is obviously not the question here. (For the view that these early cases went too far in permitting the Twenty-first Amendment to be used for economic discrimination between the states, see Abrahamson, *Whiskey—The Incidence of Public Tolerance in Price Policy* printed in Walton, Hamilton and Associates, *Price and Price Policies*, 395, 425-26 (1938).) But it is clear that the cases acceding to this protection of home-grown industry cannot stand as authority when a state demands unjustifiably lower prices, even though one result, admittedly, may be higher prices in other states.

This Court has failed to endorse its earlier general statements regarding the breadth of the Twenty-first Amendment. In 1945 it was emphasized that federal control over the interstate aspects of the alcoholic beverage industry has not been entirely delegated to the states by the Twenty-first Amendment as the early cases imply. *United States v. Frankfort Distilleries*, 324 U. S. 293 (1945).

Commentary following the *Frankfort* decision approved this restrictive view of the scope of the Twenty-first Amendment, a note in the Yale Law Journal stating:

The language of Section Two does not purport to grant to the states a plenary power unrestricted by



pre-existing constitutional limitations. True, it prohibits the transportation and importation of liquors into a state in violation of "the laws thereof," but it would not require boldness beyond the capacity of the Supreme Court to interpolate the word "proper" to modify "laws." This interpolation is supported by the canon that a construction which raises a conflict between parts of a constitution is inadmissible when, by reasonable interpretation, the parts may be made to harmonize. In other cases the Courts have freely implied similar limitations to seemingly all-embracing language in order to effectuate the purpose of an amendment. Note, *The Twenty-First Amendment Versus the Interstate Commerce Clause*, 55 Yale L. J. 815, 816 (1946).

In the past Term this Court struck down state legislation which attempted to overreach state borders in regulating alcoholic beverages. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964). The State of New York attempted to exert jurisdiction over a corporation engaged in the business of selling liquors to departing airline travelers. In attempting to justify its act, the State Liquor Authority asserted that the commerce clause does not apply to the state regulation of liquor. In support of this claim, the Authority relied upon the line of cases cited at p. ---, *supra*, much in the same way it has relied on those cases in the present action.

This Court remained faithful to its decision in *Frankfort* and rejected this view. The opinion of Mr. Justice Stewart countered the assertion that the commerce clause had been repealed by the Twenty-first Amendment by calling this view "an absurd oversimplification." 377 U. S. at 332. Mr. Justice Stewart stated:

Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like

other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case. 377 U. S. at 332.

The majority opinion of the Court of Appeals of the State of New York found that not only does the Twenty-first Amendment eliminate any commerce clause considerations, but that it also can be used to protect state legislation in direct conflict with federal statutes (R. 349). While the majority's interpretation of the relationship between the Twenty-first Amendment and the commerce clause violates the balancing test of *Idlewild*, its view that the Twenty-first Amendment can serve to allow state liquor legislation in direct conflict with federal statutes is even more in conflict with decisions of this Court.

Shortly after rendering the *Frankfort* decision, the Court made the following observation in *Nippert v. City of Richmond*, 327 U. S. 416, 425 n. 15 (1946):

"Thus, even the commerce in intoxicating liquor, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, *at any rate when the State's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic . . .*" (Emphasis added.)

Of course the Sherman and Robinson-Patman Acts are examples of this type of congressional legislation. See pp. 36-46, *infra*.

In a companion case to *Idlewild*, *Department of Revenue v. James B. Beam Distilling Co.*, 377 U. S. 341 (1964), it was held that where a state enactment affecting intoxicating liquors is contrary to an explicit command of the Consti-

tution—in that case Article I, Section 10, the export-import clause—the Twenty-first Amendment will not save the state statute. Mr. Justice Stewart, again writing for the majority, averred:

... What is involved in the present case, however, is not the generalized authority given to Congress by the Commerce Clause, but a constitutional provision which flatly prohibits any State from imposing a tax upon imports from abroad ...

This Court has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids . . . 377 U. S. at 344-46.

*Beam* also serves as a warning that the Twenty-first Amendment will not protect the attempt of Section 9 to require foreign producers to make their prices in other states of the country a basis for their New York prices. Because the terms under which import trade may be conducted necessarily involves foreign relations, any such restrictions can only be imposed by Congress or the federal executive.

If the decisions in *Idlewild*, *Beam*, *Nippert* and *Frankfort* are compromised, not only will state antitrust legislation in conflict with federal enactments be encouraged but the way will be clear for states to pass with impunity any legislation directed towards the alcoholic beverage industry in conflict with *any* federal act, notwithstanding how remote the state legislation may be from the protection of the public from the alleged social evils of liquor. The most demagogic type of state legislation could ensue. States will be free to pass legislation which could, among other things, forbid racially mixed taverns, and discriminate on the basis

of race, sex or any other criteria between those allowed to obtain liquor licenses or in any other way operate an alcoholic beverage business. See generally Comment, 25 Calif. L. Rev. 718, 728 (1937).

Such a possible result of extreme application of the Twenty-first Amendment has not escaped judicial concern, for the Sixth Circuit rejected a claim of state absolutism in the realm of liquor legislation based upon the Twenty-first Amendment when it observed:

Followed to its logical conclusion, the appellant's construction, if valid, would mean that the federal government no longer has power to punish theft of intoxicants from interstate shipments of alcoholic beverages under the authority of the so-called Car Seal Act, *nor to regulate or prohibit unfair trade practices in respect to such commodities through the Federal Trade Commission*, nor to regulate tariffs through orders of the Interstate Commerce Commission, nor to prohibit unfair labor practices affecting commerce in intoxicants by brewers or distillers under the authority of the National Labor Relations Act, 29 U. S. C. A. § 151 et seq., nor to prescribe minimum wages or maximum hours for employees in such enterprises under the authority of the Fair Labor Standards Act, 29 U. S. C. A. § 201 et seq. These implications demonstrate the tenuousness of the appellant's broad contentions. *Jatros v. Bowles*, 143 F. 2d 453, 455 (6th Cir. 1944). (Emphasis added.)

The foregoing discussion readily demonstrates the tenuousness of sweeping generalizations concerning the scope of the Twenty-first Amendment. This Court is aware that there are real limits upon state power to

legislate freely in the realm of alcoholic beverages. As succeeding sections of this Brief will illustrate, this maximum price legislation clearly violates the supremacy and commerce clauses of the federal constitution. It is submitted that this Court should not allow the Twenty-first Amendment to shield this legislation, which seeks to cure no existing evil in the alcoholic beverage traffic in New York and has immediate and substantial impact upon the operations of the industry in other states.

## POINT II

**The provisions of Section 9 requiring distillers and wholesalers to offer New York purchasers a price no higher than the lowest price charged elsewhere violate the policy and terms of federal antitrust acts and are thus in conflict with the supremacy clause of the Constitution of the United States.**

Section 8 of New York Session Laws, 1964, Ch. 531, states that Section 101-c of the ABC Law, providing for mandatory resale price maintenance of branded distilled spirits, is being repealed because it has resulted in price discrimination and disadvantage to New York consumers. This discrimination, the Legislature declares, has taken the form of unjustifiably higher prices being charged to New Yorkers, in comparison with prices charged consumers in other states. However, Section 8 continues by implying that manufacturers and wholesalers of branded distilled spirits might attempt to frustrate the elimination of price discrimination and disadvantage declared to be the result of mandatory resale price maintenance by engaging in "monopolistic and anti-competitive practices" once Sec-

tion 101-c of the ABC Law is repealed. It thus becomes a matter of "legislative determination" that the no higher than the lowest price provisions contained in Section 9 are needed to prevent manufacturers, distributors and importers of branded distilled spirits from frustrating the policy of encouraging "fundamental principles of price competition" inherent in the revocation of mandatory resale price maintenance.

Stripped of its ambiguous verbiage Section 8 states that state-enforced resale price maintenance has produced unjustifiably higher consumer prices which may continue in spite of the repeal of Section 101-c, and it is only through special anti-price discrimination and anti-monopoly legislation, directed only at certain segments of the branded distilled spirits industry, that the possible continuance of this presumed inequitable situation may be avoided. The Legislature impliedly believes that unregulated pricing policies at the distiller and wholesaler levels will not produce free and untrammelled competition but may lead to practices which cannot be policed by existing federal and state antitrust laws. It should be noted that while the Legislature struck down state-enforced resale price maintenance, it continued to permit brand owners to avail themselves of the provisions of the Feld-Crawford Act, N. Y. Gen. Bus. Law, § 369-a. The Feld-Crawford Act is the general New York fair trade statute.

Keeping in mind that the legislative purpose is to "forestall possible monopolistic and anti-competitive practices" which would, if not controlled, lead unjustifiably to higher prices for New York consumers, a comparison of this state antitrust legislation with federal acts on the same subject

will demonstrate the serious federal constitutional question involved.

By juxtaposing the Robinson-Patman Act, 15 U. S. C., §§ 13(a)-(f), 21(a) (1959), it becomes apparent that the New York act, designed to thwart potential price discrimination, is in direct conflict on several counts with this federal statute having the same purpose.

In enacting the maximum price provisions of Section 9 of Ch. 531, the New York Legislature has failed to make allowance for different market and competitive situations in different areas of the country or for variations in the cost of doing business in different states, aside from actual delivery and state excise gallonage tax expenses. Exemplary of this is the fact that all allowances, rebates, or other inducements given in other markets which contribute to the lowest net price at which a brand of liquor is sold elsewhere in the United States are required to be accorded to New York buyers, regardless of whether giving these promotional allowances to buyers in other states in fact affects the competitive position of New York sellers or purchasers. This is in clear contrast with Section 2(a) of the Robinson-Patman Act, which makes it illegal for a seller to discriminate in price between different purchasers of commodities of like grade and quality only when "the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce . . ."

The New York rule, however, is absolute. It makes no difference if price differentials in various states in no way tend to lessen competition or create a monopoly between buyers or sellers in New York or destroy or prevent competition in any other state. The Robinson-Patman Act does



not condemn mere geographical price differentials absent a showing of lessened competition between the sellers or buyers as a result of the differential. See *F. T. C. v. Anheuser-Busch, Inc.*, 363 U. S. 536 (1960); *Sachs v. Brown-Forman Distillers Corp.*, 134 F. Supp. 9 (S.D.N.Y. 1955); *In the Matter of General Foods Corp.* (I), 50 F.T.C. 885 (1954). Thus, what is permitted by the Robinson-Patman Act is prohibited by Section 9 of Ch. 531.

Moreover, Section 2(a) of the Robinson-Patman Act does not render illegal price differentials which merely reflect differences in the cost of sale resulting from differing quantities "in which such commodities are to such purchasers sold or delivered."

Section 101-b-2(b) of the ABC Law, it will be remembered, places a maximum quantity discount of 2% on sales of liquor to New York customers. If a larger quantity discount is offered to customers in other states and such discount results in the lowest price offered in the United States, that part of the discount which exceeds 2% must be granted to New York customers, regardless of the actual amount of goods ordered by the New York customer and without regard to whether such discount can be "cost justified" under the Robinson-Patman Act. See ABC Law, Section 101-b-3(i). Thus, under the terms of the Robinson-Patman Act a quantity discount may be offered only when "cost justified", but if such a legitimate differential were a factor in the lowest price charged elsewhere in the United States, one cannot sell branded distilled spirits in New York unless the same discount is granted New York customers where it may be unjustified and hence discriminatory against one's competitors selling in New York State. Cf. *F. T. C. v. Anheuser-Busch, Inc.*, 363 U. S. 536 (1960). What

is required under Section 9 of Ch. 531 is prohibited by the Robinson-Patman Act.

Section 2(b) of the Robinson-Patman Act allows the seller to differentiate in price between his customers if the seller can demonstrate that the price differential is "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

This Court has specifically ruled that the purpose of this provision is to abet what is inherent in our competitive system, i.e., to allow a seller to defend himself by meeting his competitor's price. See *Standard Oil Co. v. F. T. C.*, 340 U. S. 231, 248-49 (1951). The right to reduce prices under such circumstances is thought to be essential in any anti-price discrimination act. The 1955 *Att'y Gen. Nat'l Comm. Antitrust Rep.* discussed this concept at length on p. 181:

Whatever the interpretation of the substantive price discrimination offense, we think that a seller's right to meet a competitor's prices by granting price differentials to some customers without reducing his prices to all must remain an essential qualification to any anti-price discrimination law. For a seller constrained by law to reduce prices to *some* only at the cost of reducing prices to *all* may well end by reducing them to *none*. As the Federal Trade Commission recently recommended to Congress, "the right to meet a lower price which a competitor is offering to a customer, when this is done in good faith, is the essence of competitive economy." Anything less, we think, would move the price discrimination statute [the Robinson-Patman Act and perforce Section 9 of Ch. 531] into irreconcilable conflict with the Sherman Act.

The New York law grants no such exemption for price differentials between customers in New York and other states. Should a manufacturer or wholesaler of branded distilled spirits reduce his price in another state to meet competition from another manufacturer or wholesaler, who may or may not sell in New York, with the result that the net price becomes the lowest quoted anywhere in the United States for the particular brand, that brand of liquor cannot be sold in New York unless the same price is quoted to the appropriate New York purchasers. The seller of a brand will be compelled to grant an unearned discount in New York or be in violation of Section 9, even though the Robinson-Patman Act realizes the value to competition inherent in such price differentials. Section 9 of Ch. 531 would perforce have the effect of eliminating price as an aspect of meeting competition in these markets. It would result in a price reduction to no one, regardless of the state of individual markets.

Moreover, while manufacturers at least have the choice of whether to engage in such price competition, New York wholesalers do not. If a wholesaler in another state lowers his price to retailers to meet local competition and that price becomes the lowest at which such brand is being sold at wholesale elsewhere in the United States, New York wholesalers who are somehow determined to be "related persons", without regard to differentials in the cost of doing business, profit margins or competitive pressures, must give that same price to New York retailers or else breach Section 9 of Ch. 531.

Sections 2(d) and (e) of the Robinson-Patman Act, taken together, prevent a seller from either paying a buyer

for promotional services furnished the seller by the buyer or from granting or furnishing such services to the buyer unless the seller accords other *competing buyers* the same services on proportionately equal terms. If the purchasers are not in competition with one another, then the seller may grant disproportionate services and/or allowances. See Austin, *Price Discrimination*, 117 (1950).

However, the no higher than the lowest price amendments of Section 9 require a manufacturer or wholesaler of branded distilled spirits, who grants allowances, rebates or other "inducements of any kind whatsoever" to buyers in other states, to provide the same discounts to New York customers if these discounts have the effect of making the total net price the lowest quoted anywhere in the United States. Requiring a seller to give his New York customers the same promotional discounts given customers not in competition with New York purchasers is yet another example of how the new amendments to Section 101-b compel distillers and wholesalers of branded distilled spirits to price their goods in a manner not mandated by the Robinson-Patman Act.

Not only are the means used by Section 9 in conflict with the Robinson-Patman and Sherman Acts, but the basic predicate contained in Section 8 of Ch. 531 is not in harmony with the federal antitrust policy.

Reductions in price in various marketing areas may certainly be the result of normal competitive activity. Different prices in different markets are not only a characteristic of competition—they are also an objective of competition. In fact, in numerous suits the Federal Trade Commission has sought to *require* industries to vary their

prices to accord with differing competitive circumstances in different locations, the very practice condemned by the New York State Legislature in Section 9. See, e.g., *F. T. C. v. National Lead Co.*, 352 U. S. 419 (1957); *F. T. C. v. Cement Institute*, 333 U. S. 683 (1948); *Clayton Mark & Co.* (Dkt. 4452), *aff'd sub. nom., Triangle Conduit & Cable Co. v. F. T. C.*, 168 F. 2d 175 (7th Cir. 1948), *aff'd*, 336 U. S. 956 (1949); *Chain Institute, Inc. v. F. T. C.*, 246 F. 2d 231 (8th Cir.), *cert. den.*, 355 U. S. 895 (1957).

The conflict with Article VI, the supremacy clause, is clear, for in terms used by the Court of Appeals of the State of New York in *Quaker Oats Co. v. City of New York*, 295 N. Y. 527 (1946), New York has attempted to forbid "what the Government has authorized" or to permit what the Congress has prohibited. 295 N. Y. at 536.

A state act is invalid if it conflicts with either the language or the policy of a federal act even assuming the act to be otherwise in furtherance of the State's police power, which is not the case here. *Franklin Nat'l Bank v. New York*, 347 U. S. 373 (1954); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945). *Hill v. Florida*, 325 U. S. 538 (1945); *Northern Securities Co. v. United States*, 193 U. S. 197 (1904), *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U. S. 283 (1959). As has been seen, the no higher than the lowest price provisions of Section 9 of Ch. 531 specifically requires private action prohibited by the Robinson-Patman Act and objects to private action permitted by the Robinson-Patman Act.

But the provisions of Section 9 go further; they also contravene the policy embodied in the Sherman Act, 15 U. S. C., §§ 1-7 (1959).

Mr. Justice Black summarized the rationale underlying the Sherman Act when he said

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, *the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.* *Northern Pacific Railway Co. v. United States*, 356 U. S. 1, 4 (1958). (Emphasis added.)

The New York Legislature—ironically enough by passing legislation ostensibly seeking the same goal as federal antitrust law—subverts this federal doctrine of competition based upon free market demands as well as its own stated desire for the return of “fundamental principles of price competition” in the liquor industry. It commands producers, wholesalers and importers of distilled spirits to grant New York purchasers a price as low as that granted elsewhere regardless of differing competitive factors which may enter into the determination of that lowest price in another state. The Sherman Act does not make price differentials illegal, nor does it necessarily regard parallel prices among competitors as a violation of economic liberty. See *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U. S. 537, 541 (1954); *United States v. International Harvester Co.*, 274 U. S. 693, 708-09 (1927); *United States v. United States Steel Corp.*, 251 U. S. 417, 447-50 (1920).

Again, as with the Robinson-Patman Act, the New York provisions regarding maximum liquor pricing are in conflict with the basic elements of federal antitrust policy. The Sherman Act, "a charter of economic liberty" which assumes that government should not interfere with the free market until certain deleterious acts are definitely perceived, is subverted by the amendments to Section 101-b of the ABC Law, which establish a charter of economic restraint rather than economic freedom. A seller of branded distilled spirits in other markets, facing differing competitive situations including varying costs of doing business, must judge his pricing policy in light of the effect it will have upon his New York price. The Sherman Act is a doctrine embracing the traditional American free enterprise concept of unrestrained and vigorous competition, while the New York act is an attempt to coerce purveyors of branded distilled spirits into granting New York retailers a price which may have no relation to the actual competitive situation in New York. That such a policy is antithetical to the rationale of the Sherman Act can hardly be questioned.

As noted earlier, the real effect of Section 9 will be to force distiller-brand owners in some way to coerce related wholesalers elsewhere in the country to disclose to them the lowest price at which such wholesaler sold their respective brands during any one month, thus exposing a distiller to Sherman Act prosecution.

Likewise, the New York wholesaler, having no knowledge of wholesale prices elsewhere in the country, will be required to obtain from the distiller-brand owner the price which the distiller can affirm is the lowest price given elsewhere. Thus the New York wholesaler can sell to retailers only after receiving the approval of the distiller of the price at which he is to sell.



There can be little doubt that such activity, not directly ordered and specifically protected by the terms of Section 9, must give rise to a Sherman Act violation. Compare *United States v. Parke, Davis & Co.*, 362 U. S. 29 (1960), with *United States v. Colgate & Co.*, 250 U. S. 300 (1919). See *F. T. C. v. Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U. S. 211 (1951).

The cases discussed above lead to a single conclusion: a state statute, no matter if enacted in furtherance of a valid police power objective as is not the case here, is invalid if its terms are in conflict with the language or policy of a federal enactment. The conclusion is inescapable because the command of the supremacy clause is absolute. Federal laws are the supreme law of the land, and no contrary state enactment can challenge federal supremacy. Unlike other areas of constitutional law, the supremacy clause brooks no balancing test, no weighing of conflicting policies. Should this Court find the sections of Ch. 531 under examination in this appeal in conflict with federal law, the constitutional result mandated by Article VI must be uncompromising.

### POINT III

**Section 9 places an undue and illegal burden on interstate commerce.**

It is clear that the activities of appellants in producing, purchasing and transporting alcoholic beverages in and through the various states of the Union meet the constitutional definition of interstate commerce. Interstate com-

merce includes the actual movement of trade or commerce between the states as well as activities entirely within a state which occur at the beginning, in the middle or at the end of the flow of commerce. See *United States v. Employing Plasterers Ass'n*, 347 U. S. 186 (1954); *United States v. Yellow Cab Co.*, 332 U. S. 218 (1947); *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219 (1948); *United States v. Joint Traffic Ass'n*, 171 U. S. 505 (1898). See generally 1955 *Att'y Gen. Nat'l Comm. Anti-trust Rep.* 62-65.

The majority of the New York State Court of Appeals flatly stated that Section 9 of Ch. 531 does not interfere with interstate commerce (R. 346). But "Commerce is interstate . . . when it 'concerns more States than one'." *United States v. South-Eastern Underwriters*, 322 U. S. 533, 551 (1944) (quoting Marshall, C. J., in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1 (1824)). If Section 9 were in force, no appellant would make any contract of sale in any other state without carefully weighing the effect on his New York price schedules in the immediately ensuing month, effective during the next succeeding month. Every transaction in every other state will be subject to interference by this act of the New York Legislature. This fact was implicitly underscored by the entirety of the court below, which recognized that higher prices in other states may well be the result of the enforcement of Section 9 (R. 347, 354).

If they do not accede to the commandment of Section 9 of Ch. 531, appellants can be prohibited from doing business in New York, which accounts for 12% of the total national sales of distilled spirits. Also, any appellants filing a false affirmation face criminal penalties and loss of their licenses—even if the affirmation is innocently in er-

ror. See ABC Law, Section 101-b-3(j). In effect the New York Legislature has ordered appellants to price their goods at a level sufficient to ensure that New York retailers and consumers will receive a price as low as is granted anywhere else in the United States regardless of competitive or cost variations. It is submitted that this legislation, enacted in the guise of antitrust regulation, is an attempt to exact economic advantage in favor of New York purchasers in exchange for the right to sell goods in the largest market in the nation. As such it is patently illegal under the commerce clause. *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935); *Hood & Sons, Inc. v. DuMond*, 336 U. S. 525, 535 (1949) ("*Baldwin v. Seelig*, . . . is an explicit . . . and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone."); see Dowling, *Interstate Commerce and State Power—Revised Version*, 47 Colum. L. Rev. 547, 550 (1947).

The line of decision beginning with *Seelig* was reaffirmed recently by *Polar Ice Cream and Creamery Co. v. Andrews*, 375 U. S. 361 (1964).

*Seelig* and its successors have, of course, been severely violated by the no higher than the lowest price provisions of Section 9. From an assumption, unsubstantiated by the State and unacknowledged by appellants, that New York consumers have been paying *unjustifiably* higher prices during the reign of State-imposed mandatory retail price maintenance, the Legislature then proceeds to demand that New York purchasers receive not necessarily fair prices but the lowest prices. No consideration or determination is made whether the lowest price elsewhere in the United States is a fair price for New York buyers. Yet, distillers

and "related person" wholesalers of branded distilled spirits may not sell in the largest market in the United States, accounting for some 12% of retail branded distilled spirit sales, unless they pay tribute exacted by the New York Legislature in the form of the lowest price granted elsewhere in any other locality in the United States, regardless of competitive or market demand or cost of operations. This statutory attempt to secure economic advantage by prohibiting sales to customers in New York unless the lowest price quoted elsewhere is given in New York is an unquestioned violation of the *Seelig* line of cases.

Of course if New York can demand that branded distilled spirits be sold within the State at the lowest possible price there is nothing to prevent other states from making the same requirements before allowing branded distilled spirits to be sold. That a labyrinth of conflicting legislation regarding the subject of lowest prices could result is readily discernible. New York, pursuant to Section 101-b-3 of the ABC Law, requires distillers and wholesalers of branded distilled spirits to file a schedule of prices by the first and the 10th of the month respectively, these prices to be effective in New York during the next succeeding month. As pointed out earlier, the lowest price granted in any other state in the United States in February would be filed in the March schedule of New York prices and would be the price at which the brand is sold in New York in April.

Other states could pass statutes requiring manufacturers and wholesalers of branded distilled spirits to grant the lowest price being given in any other state precisely at the time of sale within the legislating state. Or a state could adopt a statute such as has been declared unconstitutional in an unreported Kansas decision, see *Laird & Co. v. Gage*,

Third Judicial District, D.C. No. 898461 (May 7, 1964), and demand that the lowest price given elsewhere in the United States be given in the legislating state for a definite period of time, in the case of Kansas 3 months. It can be seen that the possibilities and combinations are virtually limitless.

It is also apparent that manufacturers and wholesalers of branded distilled spirits, because of conflicting requirements as to when the lowest price is to be determined, could be put in the position of being unable to comply with one act because of the mere fact they were attempting to comply with another. Moreover, the danger arises that the price for distilled spirits might become frozen at a particular level; if a distiller, nationwide wholesaler or importer attempted to raise their prices in any particular state they would more than likely be risking violation of another state's no higher than lowest price statute because of the latter state's legislation being based upon conflicting time sequences.

That the Constitution of the United States will not suffer such a morass of conflicting and onerous legislation to burden interstate commerce is clear. It is because of this possibility that this Court has laid down the doctrine that the Constitution does not permit a state legislature to control the conduct of those engaged in interstate commerce beyond the boundaries of the legislating state. See, *e.g.*, *Boseman v. Connecticut General Life Ins. Co.*, 301 U. S. 196 (1937); *Hartford Accident & Indem. Co. v. Delta & Pine Land Co.*, 292 U. S. 143 (1934). The New York statute has that effect.

Similarly, this Court has recently held that otherwise unobjectionable rate regulation must fall as an undue bur-

den on commerce if it had discernible effect on rates in other states. *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U. S. 84, 92 (1963).

Whether possible anti-competitive practices should be regulated by the imposition of maximum price legislation on this or any other industry is a question which must be resolved in a nationally uniform manner, involving as it does serious questions of federal antitrust policy. See p. 44, *supra*. The ostensible purpose for enacting Section 9—to forestall possible anti-competitive problems—is not a local matter, without the interest and reach of federal laws capable of correcting latent as well as actual competitive abuses. Even if such a state statute has some redeeming police power virtue, which this one clearly does not, it nevertheless constitutes an undue burden on interstate commerce if it tends to force those bound by it to expose themselves to contrary legislation enacted in other states. See *Bibb v. Navajo Freight Lines, Inc.*, 359 U. S. 520 (1959); *Morgan v. Virginia*, 328 U. S. 373 (1946); *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945).

This is not a case where the state has legislated in order to promote temperance, the sole rationale of the New York ABC Law, see p. 55, *infra*. Nor is it one where the state has reasonably requested the distilled spirits industry to contribute its just share of revenue to the state. Rather, this statute is solely an unreasonable, unjustified attempt by a state in which 12% of the national trade in distilled spirits is conducted to use its economic power to coerce distillers, wholesalers and importers into accommodating the state with prices which bear little relation to those that would obtain if New York market conditions were the determinant. But New York market conditions are ignored

while New York prices are based upon the costs, profits, labor conditions, taste preferences and governmental regulations which prevail in other states. It is submitted that it is precisely this type of legislation—grievously burdensome on commerce in other states without being of any value in protecting the public from the social problems connected with alcoholic beverage traffic—which must fall under the test reaffirmed only last Term in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964).

#### POINT IV

The provisions of the new act requiring distillers and wholesalers to offer New York purchasers a price no higher than the lowest price given elsewhere are not justified under the state's police power and are hence a violation of due process of law guaranteed by the Constitution of the United States.

**A. Section 9 is not in Furtherance of a Valid Police Power Objective.**

The Fourteenth Amendment to the Constitution of the United States prohibits the several states from depriving any person "of life, liberty, or property, without due process of law."

It is well recognized that the constitutional prohibition against deprivation of one's property without due process of law is absolute unless property interests are affected as a result of a valid exercise of the state's inherent police power. The police power gives the state the right to impair the free enjoyment of one's property only if necessary to provide for the health, safety and general welfare of the people.



While the legislative right to pass enactments designed to advance the health, safety and welfare of the people is necessarily a broad power, it is not without limitation, for the Fourteenth Amendment to the federal constitution stands as a guardian of individual rights when state legislation affecting these rights does not comport with police power standards.

The distilled spirits industry in New York is basically private in nature. It is not regulated as a public utility. While admittedly subject to the sanctions of the Alcoholic Beverage Control Law, which attempt to prevent well recognized social harms that may result from undue consumption, the industry is none the less protected by basic constitutional guarantees. So long as the State allows alcoholic beverages to be sold within New York, it cannot deny members of the industry their rights under these constitutional guarantees. See *Russo v. Morgan*, 174 Misc. 1013, 1015, 21 N. Y. S.2d 637, 640 (Sup. Ct. 1940). See also *People v. Luhrs*, 195 N. Y. 377 (1908); *Wynehamer v. People of New York*, 13 N. Y. 378 (1856); *Clement v. Two Barrels of Whiskey*, 136 App. Div. 291, 120 N. Y. Supp. 1044 (4th Dep't 1910); *Schwegmann Bros. v. Louisiana Bd. of Alcoholic Beverage Control*, 216 La. 148, 43 So. 2d 248 (1949); cf. *Levine v. O'Connell*, 275 App. Div. 217, 88 N. Y. S.2d 672 (1st Dep't 1949), *aff'd*, 300 N. Y. 658 (1950).

Appellees throughout the course of this action have taken a position which leads to the belief that they consider members of the alcoholic beverage industry bereft of the right to challenge state alcoholic legislation on virtually any constitutional ground. Members of this industry, appellees would submit, are for some unexplained reason not entitled to rely upon the constitutional guarantee of due

process available to those in other businesses. Appellees would have judicial inquiry cease once it had been ascertained that a state legislature passed the bill in the belief it was acting for the benefit of society. State legislatures rarely profess to enact legislation for any other purpose.

The acceptance of this position, of course, would mean that there can be no meaningful judicial review of any state alcoholic beverage legislation. It does not follow that because a state can constitutionally prohibit the sale of alcoholic beverages, it is free to impose the most onerous and unreasonable burdens upon industry members if it permits the sale of these beverages. See *Hornsby v. Allen*, 330 F. 2d 55 (5th Cir. 1964); *Goesaert v. Cleary*, 335 U. S. 464 (1948) (by implication).

Although this Court in recent years has refused to strike state statutes on substantive due process grounds, language in cases brought before it has indicated that the Court will apply the constitutional guarantee when as here there is no police power purpose being served. See *Goldblatt v. Town of Hempstead*, 369 U. S. 590, 594-95 (1962); *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488 (1955); *Cities Service Co. v. Peerless Co.*, 340 U. S. 179, 186 (1950); *Nebbia v. New York*, 291 U. S. 502, 525 (1934).

An examination of judicial precedent upholding maximum price legislation on due process grounds shows that these cases divide into two categories. First there are those which deal with essential goods, *e.g.*, *Nebbia v. New York*, 291 U. S. 502 (1934) (milk pricing). Then there are cases which uphold maximum price limitations because of industry abuses which can only be corrected by this device. See *Gold v. Di Carlo*, 235 F. Supp. 817 (S. D. N. Y. 1964), *aff'd*, 380 U. S. 520 (1965). Scrutiny of Section 9 and the

professed legislative intent underlying its passage readily reveals that it fits into neither of these categories. As Chief Judge Desmond noted in his dissenting opinion :

The only "evil" against which this legislation is directed is found, apparently, in the fact that some people somewhere in this country under other unknown and uninvestigated conditions buy liquor more cheaply than we do. If this be good law, similar statutes may be passed as to any sale-licensed commodity. 16 N. Y. 2d at 63.

The police power rationale for the entirety of the New York ABC Law is contained in Section 2 of that law, which provides :

It is hereby declared as a policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages *for the purpose of fostering and promoting temperance in their consumption* and respect for and obedience to the law. (Emphasis added.)

Section 8 of Ch. 531, as noted, states that the particular purpose for the enactment of Section 9 was to "forestall possible monopolistic and anti-competitive practices."

Nothing in the legislative history of the new act nor in the Moreland Commission reports evidences that Section 9 was enacted to thwart any other evil. Thus, to hold Section 9 constitutional, this Court must be convinced that the no higher than the lowest price provisions—maximum price limitations—were in fact enacted for the purpose of and reasonably serve either to promote temperance or to "forestall possible monopolistic and anti-competitive practices."

Looking first to the economic evil that allegedly will result if maximum price provisions are not enacted, uncontradicted affidavits contained in the record demonstrate the

belief of a professional economist (R. 237-97) as well as members of the industry that vigorous competition has prevailed in the past and should in all likelihood continue for the foreseeable future in the distilled spirits industry at the manufacturing, wholesaling and importing levels. Indeed, the now repealed mandatory resale price maintenance section was enacted in response to the vigorous industry competition in New York which the Legislature felt was resulting in prices too low for the public good. See ABC Law, Section 101-c-1. Appellees have offered nothing to show that competition within the industry would be any less vital if a free market prevailed in New York today. A 1963 report on industry advertising regulation published by the Joint Committee of the States to Study Alcoholic Beverage Laws, a body composed of state liquor control board members, confirms the statements of these affidavits by asserting that members of the industry "are in a highly competitive enterprise." Joint Committee of the States to Study Alcoholic Beverage Laws, *Uniform Standards for Advertising of Alcoholic Beverages in Newspapers and Magazines*, 30 (1963). This view is further supported in Alderfer and Michl, *Economics of American Industry*, 612 (3d ed. 1957).

It is axiomatic that monopolistic and anti-competitive practices cannot be pursued where competition is vigorous, for by definition it is the very purpose of these practices to restrict competition and thus among other things deprive the purchaser of the goods in question, the fair price that results from free market action and to secure an artificially high price for the benefit of the producers. See 1955 *Att'y Gen. Nat'l Comm. Antitrust Rep.*, 324.

Of course an obvious flaw in the stated purpose underlying Section 9 is the failure to define "unjustifiably higher" prices. The Legislature seems to attempt to transform a marketing reality—an actual differential between consumer price levels in New York and certain atypical markets—into an economic concept—price differentials are to be suppressed because they are warnings of possible attempts in the future by distillers, wholesalers and importers to engage in monopolistic and anti-competitive practices. But in terms of antitrust economics an "unjustifiably higher" price can result only when "a few persons acting together can control the prices of a commodity . . ." *American Tobacco Co. v. United States*, 328 U. S. 781, 811 (1946). This attempt to use mere retail price differentials between disparate markets as a basis upon which to predicate the potential occurrence of anti-competitive practices at the distiller and wholesaler levels emphasizes the total lack of legislative inquiry into the capacity of these segments of the industry to engage in such practices. The conflict of this concept with federal antitrust policy has been documented at pp. 44-46, *supra*.

Competitive conditions and the cost of doing business obviously may vary widely between markets, and a producer or wholesaler of goods must be flexible enough to respond to these conditions. This is true for any product, whether it be liquor or candy, but it is especially true of liquor since the industry is subject to a wide variety of state regulation which in itself tends to affect competitive conditions in particular states. For example, lower net prices from distillers to wholesalers and from wholesalers to retailers exist in certain states because temporary promotional and advertising allowances are granted to pur-

chasers by the sellers. In New York this practice is prohibited by Section 101-b-2(b) of the ABC Law. Because advertising allowances are forbidden in New York, distillers must bear the entire burden of this expense. An advertising allowance, an expenditure designed to stimulate sales at the expense of one's competitor, is impliedly looked upon by the New York Legislature as an anti-competitive device from which New York purchasers must be protected. In effect Section 9 of Ch. 531, requiring such allowances and discounts to be a factor in computing the lowest price given elsewhere, stipulates that distillers and New York wholesalers must indirectly give these allowances to purchasers in New York when they are forbidden by law to grant them directly because they are not considered beneficial to the promotion of temperance. The result will be that the distiller will be forced to deduct advertising allowances given in other states from his New York prices, while continuing to bear the entire expense of all New York advertising. See ABC Law, Section 101-b-1.

The Legislature has set up the standard of possible monopoly, an evil theoretically existing in any industry. After establishing the evil from whole cloth, it proclaims monopoly can only be averted by demanding the lowest net prices charged elsewhere. In other words retail market price differentials are *per se* indications of an incipient monopolistic condition at the production and primary distribution levels. This view finds no support in the field of antitrust economics.

The only other reasonable basis for legislative action affecting the price at which manufacturers and wholesalers of branded distilled spirits may sell in New York is the promotion of temperance. To reiterate, in order to avoid viola-

tion of the Fourteenth Amendment to the Constitution of the United States, the New York Legislature must have detected an evil resulting from the manufacture, sale or use of alcoholic beverages which demands that maximum price limitations be placed upon the sale of these beverages by distillers and wholesalers. But, as the dissent below cogently illustrates, these maximum price provisions bear no reasonable relationship to the protection of the health, morals or welfare of the community.

The command of Section 2 of the ABC Law is a positive one; legislation regulating the manufacture, sale or use of intoxicating liquors is a proper exercise of the police power only if it *promotes* temperance. Thus, the finding of the Moreland Act Commission in support of the repeal of mandatory resale price maintenance that price has little or no relation to temperance is not grounds for a determination that placing maximum prices upon sales of branded liquor to New York wholesalers and retailers will somehow *promote* temperance. That the legislative enactment may have no deleterious effect upon temperance is immaterial. To accord with Section 2 of the ABC Law, the statute must *affirmatively promote temperance*.

This result is in accordance with the position the distilled spirits industry occupies in the State of New York. As noted it is, first of all, a private industry, unlike public utilities, and is operated in the same general manner as other private industries. However, pursuant to Section 2 of the ABC Law, it is subject in New York to intensive regulation "Because of the many evils attendant upon traffic in liquor. . . ." *Calvary Presbyterian Church v. State Liquor Authority*, 245 App. Div. 176, 178, 281 N.Y. Supp. 81, 85 (4th Dep't 1935), *aff'd*, 270 N. Y. 497 (1936). Hereto-



fore, in New York, any challenge to the constitutionality of enactments affecting intoxicating liquors has been decided by the test of whether the challenged enactment met the legislative purpose of promoting temperance announced in Section 2. See *People v. Ryan*, 274 N. Y. 149, 152 (1937); *People v. Tourists International, S.A.*, 40 Misc. 2d 99, 105, 242 N. Y. S. 2d 756, 762 (Sup. Ct. 1963).

It is patent that fixing maximum price limits upon which manufacturers and wholesalers of branded distilled spirits may sell in New York in order to assure purchasers the lowest possible price for these liquors does not promote temperance. As it was put in Chief Judge Desmond's dissenting opinion below, "To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of excessive smoking by abolishing cigarette taxes" (R. 352).

Appellants, in view of the Moreland Act Commission's determination that the propensity to drink is unrelated to the price at which liquor is sold, cannot see how an argument can be made that a statute avowedly designed to accord the lowest possible price to New York liquor consumers can in fact affirmatively serve to ensure that these consumers are temperate in their use of these beverages. Can it be argued that the interests of moderation in alcoholic beverage consumption will be affirmatively advanced if consumers obtain the lowest possible prices for nationally branded spirits but not for private label brands and wines? Will alcoholism, public drunkenness and sales to minors be reduced if liquor is made more accessible through lower prices? These questions are answered in the asking.

Appellees have claimed that this particular legislation benefits the general welfare solely because it will immediately result in lower prices to consumers in New York.

Aside from the fact that this is neither the purpose nor, so long as the New York fair trade law applies to the alcoholic beverage industry, a probable result of Section 9, it is submitted that this argument can be applied to legislation dealing with any commodity. If appellees' views as to the scope of the power to legislate on behalf of the "general welfare" are accepted, then the due process clause can be no barrier to legislation similar in construction to Section 9 fixing the maximum prices of automobiles, television sets and the like. Appellants offer that this type of legislation is yet to be deemed a proper exercise of a state's police power.

**B. Section 9 is Arbitrary and Unreasonable.**

Assuming arguendo that these maximum pricing provisions function to promote the health, safety and welfare of the general populace, they still violate the Fourteenth Amendment to the Constitution. This is so because Section 9 imposes unreasonable, arbitrary and capricious burdens upon appellants which do not serve to remedy the purported evil. See *Goldblatt v. Town of Hempstead*, 369 U. S. 590 (1962); *Nebbia v. New York*, 291 U. S. 502 (1934).

Bearing in mind that this legislation is justified in Section 8 as special antitrust regulation directed to possible "monopolistic and anti-competitive practices," it becomes clear that this maximum price measure regulating the distilled spirits industry is unreasonable. This becomes apparent merely by juxtaposing Section 9 of Ch. 531, whose rationale as we have seen is the same as other antitrust acts, with the terms of these acts. None of them, state or federal, in order to protect vigorous competition provides that sales can be made only if the sellers agree to charge

maximum prices based upon the lowest price given elsewhere in the United States. Direct interference with free market pricing structures is inimical to the rationale of these acts which is a belief in free and unfettered competition.

The legislation is arbitrary, capricious and unreasonable in several other respects. The law is penal in nature, see section 101-b-3(j), and one signing the affirmations that the price filed for a particular brand in the monthly price schedule is no higher than the lowest price offered anywhere else in the United States does so at his peril.

The problems of determining the price at which a distiller's brands are sold by wholesalers to retailers are particularly grave. Section 101-b-3(f) requires the distiller to affirm that the price at which New York wholesalers who are "related persons" will sell to retailers in the next succeeding month is no higher than the lowest price at which wholesalers doing a "substantial" business in the distiller's brands in other states sold those brands during the immediately preceding month.

Most of the wholesalers to whose prices the distillers must attest are independent businessmen and are under no legal obligation to give information as to their prices or the quantity of the business they do in a particular distillers' brands to the distillers. Thus, for example, a distiller may sell his brand to an independent Chicago wholesaler, who does a substantial volume of business in the distiller's brands. The Chicago wholesaler, permitted by law, may charge a net price to retailers that includes various discounts and promotional allowances. These discounts and allowances are not published in any trade journal. But before a New York wholesaler who is deemed to be a "related

person" can sell that brand to New York retailers, the distiller must have verified an affirmation that the price schedule filed by the New York wholesaler lists a price to New York retailers that is no higher than the lowest price at which the Chicago wholesaler sold that brand during the preceding month.

The record shows that independent wholesalers in other states, under no legal compulsion to do so, may not furnish such information to the distillers (R. 300, 303, 305). Section 101-b-3(f) will prevent a large group of New York wholesalers from selling branded distilled spirits to retailers in New York; it will require distillers to threaten to refuse to sell to wholesalers elsewhere in the United States unless such information is delivered, a type of coercion that would appear to be objectionable under federal antitrust laws. See *F. T. C. v. Beech-Nut Packing Co.*, 257 U. S. 441 (1922); *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960); *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d 1 (7th Cir. 1959).

The majority opinion below fails to evince concern over this situation. Nor does it even acknowledge that distillers and New York "related person" wholesalers—both in their own way dependent upon obtaining pricing information from wholesalers throughout the country—have no legal means by which they can obtain the information needed to satisfy the command of Section 9.

Section 9 is also unreasonable because it exposes distillers to extortionate practices at the hands of "related person" wholesalers in other states. Once again, taking the example of the Chicago wholesaler who does a "substantial" part of his business in the brands of one distiller, assume that out of vindictiveness or in an attempt to

extort various concessions from the distiller, this Illinois wholesaler threatens to or does sell one case of each of the distiller's brands several dollars below the ordinary case price. The predicament in which this maneuver would place the distiller is obvious. He could not sell the brand in New York for the month in question unless New York "related person" wholesalers file a price schedule containing the extortionate price charged by the Chicago wholesaler. Of course, the New York distiller to wholesaler price would have to be adjusted accordingly. The loss to the distiller in actual profits and in the good will of New York wholesalers would be enormous. All this because of the sale of one case by a reprehensible wholesaler.

Taken one step further, the one case sale at the unjustified lower price would place New York wholesalers in an intolerable position. If "related person" wholesalers chose the course of filing the Chicago wholesaler's case price for the brand rather than not selling it at all, non-related person New York wholesalers, otherwise free to sell at a price of their own choosing, would either be forced to meet this price or face the loss of sales to those selling at the lower price. Retailers would stockpile large orders at the lower per case price which would cause wholesalers and distillers irreparable loss even if the normal price were soon restored.

If "related person" wholesalers chose not to sell the brand at all during the period rather than sell at the cut price per case, non-related person wholesalers, free to sell at a price of their own choosing, could thus charge an "unjustifiably higher" price because of the freedom from competition with the "related person" wholesalers. In any event, they would have the entire New York market to themselves for at least a month. The "related person" wholesalers,

aside from being penalized the loss in sales, might permanently lose customers to the non-related person wholesalers. The statute thus gives any "related person" wholesaler anywhere in the country the power to blackmail appellant-distillers. This condition could also permit collusion between a distiller and an out of state wholesaler, with the result that the wholesaler could sell the brands of the distiller's competitor at prices so low as to prevent the competitor from being able to market his brands in New York. The collusive distiller would then enjoy a marked competitive advantage in New York for the period his competitor was faced with the dilemma of selling at a severe loss in New York or not selling at all and risking the loss of his New York market. That such a fantastic spectacle is without the bounds of reason can hardly be questioned.

There is another glaring defect in the requirement of Section 9 of Ch. 531 that "related person" wholesalers located in New York sell to New York retailers at a price no higher than the lowest sold by "related person" wholesalers elsewhere in the United States. The section makes no allowance for variances in wholesaler cost and profit margins, two figures that fluctuate widely throughout the United States because of such factors as differences in wages, local sales and gross receipts taxes, overhead and number of retail licensees serviced. Thus, New York wholesalers, who enjoy one of the lowest profit margins and endure one of the highest percentages of operating costs, see p. 15, *supra*, must offer New York retailers a price which may have been offered to retailers in other states by a wholesaler who enjoyed a much higher operating profit and a much lower percentage of net operating expense.

The gross inequity of this provision is patent, for New York wholesalers are at the mercy of those operating in other states who, of course, care nothing for the plight of New York wholesalers but are only concerned with competitive conditions in their own market. The obvious effect of such a provision will be that those New York wholesalers unable to exist by the standards prevailing in another market will be driven out of business. The bitter irony of this situation is apparent—a statute ostensibly devised to limit monopolistic practices and encourage free price competition will inevitably have the effect of reducing the number of wholesalers and establish a much more fertile field for monopoly operations. Such obvious unreasonableness should not be sanctioned by this Court.

In summary this Court must conclude that with present antitrust laws readily available to achieve the professed legislative goal without penalizing the innocent as well as those who may be guilty of anti-competitive practices in the future, Section 9 of Ch. 531 is patently arbitrary and unreasonable because it does not lead to a reasonable expectation of achieving the state's objective, and it forces "related person" New York wholesalers to price their merchandise in accordance with conditions prevailing in other markets.

### **C. Section 9 is Intolerably Vague.**

It is well established that a legislative enactment requiring prospective action and imposing criminal penalties for failure to act correctly is violative of due process of law unless its terms are sufficiently clear for a man of reasonable intelligence to comply with them.

It cannot be overemphasized that a statute which makes criminal conduct otherwise lawful must, by its nature, "be



more definite than civil statutes." Note, *Due Process Requirements in Statutes*, 62 Harv. L. Rev. 77, 85 (1948); see *Winters v. New York*, 333 U. S. 507, 515 (1948).

As heretofore pointed out, what is now Section 101-b-3(f) of the ABC Law requires brand owners of liquor to file a verified affirmation that the price of wholesalers selling the brand owner's brands to New York retailers is no higher than the lowest price charged by "such brand owner . . . or any related person" to any retailer elsewhere in the United States. The definition of a "related person" includes any person

. . . (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent . . . ABC Law, Section 101-b-3(d)(f).

The act and the regulations recently promulgated pursuant thereto by the State Liquor Authority have segregated those who sell liquor to New York retailers into the following categories.

If one is a brand owner or a person "related" to the brand owner, the price charged to New York retailers can be no higher than the lowest charged elsewhere in the United States by the brand owner or a non-New York "related person." The brand owner is charged with affirming and verifying this price to be no higher than the lowest charged elsewhere. See ABC Law, Section 101-b-3(f); Rule 16 of the State Liquor Authority, as amended.

If, however, a New York wholesaler is willing to affirm he is not "related" to the brand owner, he may then avail himself of the less rigorous requirements of Section 101-b-3(g). As interpreted by amended Rule 16 of the recent regulations, paragraph (g) requires a non-related person

wholesaler selling to New York retailers to affirm only that *his* prices to retailers in other states are no lower than those he has filed in his New York price schedule.

Patently, if one sells to New York retailers only he can charge any price he pleases, unlike his "related person" competitor, who has his maximum price determined as the lowest price charged by any other "related person" wholesaler elsewhere in the United States. If one does sell to retailers in another state and is not a "related person", he must file a New York price no higher than the lowest price *he* charges in any other state.

The obvious question is how does one ascertain exactly who is a "related person." The question is hardly academic to one charged at the risk of criminal and civil penalties and the loss of license with affirming that a "related person" elsewhere in the United States did not sell either to wholesalers or retailers, as the case may be, at a price lower than that contained in the price schedules of New York "related person" wholesalers for a particular month. Further, how can wholesalers know if they are related persons, interdicted from selling to their customers until the brand owner files his affirmation, or if they retain the traditional free enterprise right to sell at a price of their own choosing.

Appellants submit that there is no way of determining who these wholesalers are and that manufacturers charged with affirming that these wholesalers' prices are the lowest given elsewhere have no standard by which to avoid the criminal penalties of the act.

There are over 1,000 licensed wholesalers operating throughout the United States (R. 84). Of these some may do as much as 80 per cent of their business in the brands of

a particular brand owner (R. 193-94). From this high point, the percentage decreases to a very small level. These percentages are also representative in New York. At what stage in this spectrum is a brand owner safe in assuming that a particular wholesaler is a related person or a wholesaler in assuming he is not? Is it 40 per cent, 50 per cent, 20 per cent? And if a wholesaler only does 3 per cent of his business in the brands of a particular brand owner but that 3 per cent represents his profit margin, can one safely say that the wholesaler does not do a substantial part of his business in the brands of the brand owner concerned? It is assumed that "exclusive" means 100 per cent, but when it comes to determining what "principal or substantial" means one required to file an affidavit at the peril of up to six months in prison is not furnished with the constitutional guidelines required by the authority cited above.

An example of how small a percentage the word "substantial" may encompass in an antitrust context is given in the case of *Brown Shoe Company v. United States*, 370 U. S. 294, 327 (1962), an antitrust case in which it was found that a shoe manufacturer with less than 5 per cent of the market nevertheless had a sufficient share of that market to allow it "to substantially lessen" competition. See also *Standard Oil Co. of California v. United States*, 337 U. S. 293 (1949) (6.7% of the area market in question); *International Salt Co. v. United States*, 332 U. S. 392 (1947) (\$500,000 volume considered substantial *per se*).

Since it is to a New York wholesaler's advantage not to be designated a "related person", there is every likelihood that brand owners, attempting to avoid criminal penalties by affirming the price schedules of many wholesalers, will come

into conflict with wholesalers who deny they are related. Such disharmony could well militate against the achievement of an orderly pattern of liquor distribution which it is the purpose of the ABC Law to encourage in seeking to achieve its overall goal of promoting temperance. See ABC Law, Section 101-b-1. But as the law now stands a wholesaler has no recourse to state authorities if a distiller should decide the wholesaler conducts a "substantial" part of his business in the brands of the distiller. The wholesaler's right to price freely can thus be abrogated by an act over which he has no control.

In sum, one is forced to grope in the dark and make arbitrary decisions as to which of his many purchasers is a statutory "related person." Should he guess wrong he may go to prison, his firm may lose its license and the wholesalers of New York, who have no hand in determining who is a related person, may nevertheless be prevented from selling the merchandise involved to New York retailers. It is difficult to imagine a more clear cut example of unconstitutional burdens arising from the vagueness of a statute.

### POINT V

**The no higher than the lowest price provisions of Section 9 of Chapter 531, 1964 New York Session Laws, deny appellants equal protection of the laws guaranteed by the Constitution of the United States.**

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

The essence of this constitutional requirement is that all those similarly situated must be treated alike. That is,

legislation cannot constitutionally discriminate in its application between those in a group having definite attributes of identity. *Reynolds v. Sims*, 377 U. S. 533 (1964); *McGowan v. State of Maryland*, 366 U. S. 420 (1961).

With these guidelines in mind, it becomes necessary to examine Section 9 of Ch. 531 to ascertain if discrimination against members of the same general class has been effected. Wholesalers in New York who somehow are determined not to be "related persons" are unaffected by Section 9. See ABC Law, Section 101-b-3(g); State Liquor Authority, Rule 16, as amended. Insofar as the statute is concerned they can sell the same brands sold by "related person" wholesalers at any price they choose. Yet it has been seen that "related person" wholesalers will not be able to sell branded liquor until receiving an affirmation from the brand owner that the price schedule filed by the wholesaler lists a price no higher than the lowest at which the brand owner or wholesalers in other states who come within the definition of related persons sold the product in the immediately preceding month.

If the brand owner for any reason fails to file such an affirmation, the New York related person wholesaler is prevented from selling the brand for at least a month. ABC Law, Section 101-b-3(h). On the other hand the unrelated New York wholesaler will be able to sell that very brand at a price of his own choosing. These New York wholesalers will certainly enjoy a marked competitive advantage. As the cases clearly indicate, such discrimination between those having no marked distinguishing characteristics is prohibited by the equal protection clause.

In upholding the statute, the majority of the court below failed to discuss this example of prohibited legislative discrimination.

The treatment given to private brands by the legislation in question is another example of unconstitutional discrimination. Distilled spirits marketed as "private brands" owned by a New York retailer are not subject to the provisions of Section 9 of Ch. 531. Yet private brands in 1963 accounted for 12 per cent of New York's retail package store sales in stores handling private labels. These labels are sold in direct competition with nationally branded items. They often enjoy a competitive advantage as the brand-owner retailer, making a larger profit on his private brands, will often attempt to convince a consumer to select the private label in preference to a nationally marketed brand. No legislative determination to the effect that owners of private labels are less likely to charge unreasonably high prices as opposed to sellers of nationally branded distilled spirits exists. And yet brand owners of nationally branded liquors are forced to undergo added expense and face possible criminal penalties, in addition to risking the loss of their license, while those owning private label brands are exempt. It is this type of discrimination which is clearly prohibited by the equal protection clause of both the State and federal Constitutions.

In summary it is believed that there is no legitimate basis for discriminating against manufacturers and related person wholesalers of branded distilled spirits whose products are sold in the same retail outlets and in competition with private label brand liquors. It cannot be doubted that compliance with Section 9 of Ch. 531 will be a costly and burdensome process at best. To make manufacturers and "related person" wholesalers of branded distilled spirits risk their right to do business in New York and not impose the same conditions upon other wholesalers, or upon private

label owners is clearly an improper discrimination. It is the purpose of the equal protection clause to prevent just such discrimination.

## POINT VI

**Certain provisions of Section 7 of Chapter 531, 1964 New York Session Laws, also violate the federal constitution.**

Section 7 of Ch. 531 would require brand owners to file schedules of their prices to wholesalers "irrespective of the place of sale or delivery." This new requirement can only mean that sales by brand owners to all wholesalers in every state must be filed with the State Liquor Authority.

The rationale for this provision is obvious; it will provide the Authority with an aid in policing the lowest price affirmations of Section 9 of Ch. 531. Regardless of purpose, the commerce clause of the federal constitution does not permit New York to require brand owners to file this information regarding their operations in other states. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U. S. 132, 154 (1963).

Section 7 also requires the basic price schedules to contain "the net bottle and case price paid by the seller." By its terms Section 7 applies to all brand owners of liquor, vintners of wine and wholesalers of both, but amended Rule 16 of the State Liquor Authority has confined its impact only to importers and wholesalers of distilled spirits by exempting vintners and distillers from the requirements of the express statutory terms.

It is submitted that not only does this discriminatory rule exceed the authority of the State Liquor Authority in



that it is an attempt to amend legislation rather than supplement it, see *Kasper v. O'Connell*, 38 Misc. 2d 3, 237 N. Y. S. 2d 722 (Sup. Ct. 1963); *Kaplan v. McGoldrick*, 198 Misc. 440, 100 N. Y. S. 2d 45 (Sup. Ct. 1950); *New York City Housing Auth. v. Knowles*, 200 Misc. 156, 103 N. Y. S. 2d 270 (Munic. Ct. 1951), but that there is no valid reason for requiring this information. The Legislature is concerned in Ch. 531 with the lowest price charged by manufacturers, importers and wholesalers to their customers, not with the cost of the goods to these sellers. Further, the difference between the price paid by the seller and the price he charges his customer can be misleading, for there is no provision to reflect the seller's expenses which, as pointed out, leaves New York wholesalers with one of the lowest margins of profit among distilled spirits wholesalers in the United States. This requirement will erroneously convince one's customers that the seller is enjoying an inordinate profit and will lead to an unjustifiable call for still lower prices. Certainly no more capricious and constitutionally unreasonable act can be imagined than one having no relation even to the avowed legislative purpose.

## CONCLUSION

This case raises questions of far-reaching social and economic importance, which can be answered only by resolving several acute issues of federal constitutional law, including:

1. Is a state statute which fails to promote temperance, but which fixes maximum prices for distilled spirits in one state at a price no higher than the lowest price charged in any other state and thereby levies a major economic

burden on the consumers of distilled spirits in other states, validated by the 21st Amendment to the Constitution of the United States?

2. Is not a state statute requiring distillers and wholesalers of alcoholic beverages to sell at a price no higher than the lowest price charged in any other state in conflict with the terms and policy of the Robinson-Patman and Sherman Antitrust Acts, and thus violative of the supremacy clause of the Constitution of the United States?

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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## APPENDIX A

### PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES AT ISSUE

#### Article I, Section 8, Clause 2—The Commerce Clause.

“The Congress shall have Power . . .

\* \* \* \* \*

to regulate Commerce with foreign Nations, and among the  
several States . . .”

#### Article VI—The Supremacy Clause.

\* \* \* \* \*

“This Constitution, and the Laws of the United States  
which shall be made in Pursuance thereof . . . shall be the  
supreme Law of the Land; and the Judges in every State  
shall be bound thereby, any Thing in the Constitution or  
Laws of any State to the Contrary notwithstanding.”

#### Amendment XIV.

“Section 1. All persons born or naturalized in the  
United States, and subject to the jurisdiction thereof, are  
citizens of the United States and of the State wherein they  
reside. No State shall make or enforce any law which shall  
abridge the privileges or immunities of citizens of the  
United States; nor shall any State deprive any person of  
life, liberty, or property, without due process of law; nor  
deny to any person within its jurisdiction the equal pro-  
tection of the laws.”

*Appendix A***Amendment XXI.**

“Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

**FEDERAL STATUTES AT ISSUE****The Sherman Act—28 U. S. C. §§ 1-7 (1959).**

“Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .”

**The Robinson-Patman Act—15 U. S. C. §§ 13(a)-(f), 21(a) (1959).**

“Sec. 2 (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the

*Appendix A*

cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

“(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting

*Appendix A*

the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

\* \* \* \* \*

“(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities.

“(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

\* \* \* \* \*



## Appendix A

## LAWS OF NEW YORK.

## CHAPTER 531

AN ACT to amend the alcoholic beverage control law, in relation to authorizing the issuance of special licenses to sell liquor at retail for on-premises consumption, prohibiting price discrimination in sales to wholesalers and retailers, prohibiting liquor sales below cost at retail for off-premises consumption, regulating the minimum consumer resale price of wine, repealing section one hundred one-c of such law relating to minimum consumer resale prices, repealing subdivisions four and four-a of section one hundred five of such law relating to required minimum distances between premises licensed to sell at retail for off-premises consumption and making an appropriation therefor

Became a law April 16, 1964, with the approval of the Governor. Passed, on message pursuant to article IV, section 3 and message of necessity, pursuant to article III, section 14 of the Constitution, by a majority vote, three-fifths being present

*The People of the State of New York, represented in Senate and Assembly, do enact as follows:*

Section 1. Subdivision three of section fifty-five of the alcoholic beverage control law, as last amended by chapter nine hundred five of the laws of nineteen hundred sixty-one, is hereby amended to read as follows:

3. No such license shall be issued, however, to any person for any premises other than *premises for which a license may be issued under section sixty-four or sixty-four-a of this chapter* or a hotel [ , club, vessel, car, or such ] or premises which are kept, used, maintained, advertised or held out to the public to be a place where food is prepared and served for consumption on the premises in such quantities as to satisfy the liquor authority that the sale of beer intended is incidental to and not the prime source of revenue from the operation of such premises. The foregoing provisions of this subdivision shall not apply to any prem-

EXPLANATION — Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

Those portions of Section 7 of Ch. 531 at issue in the instant case are underscored. See pp. A-13, A-14. Section 9 of Ch. 531 is set forth at A-17 through A-20.

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ises located at, in, or on the area leased by the city of New York to New York World's Fair 1964 Corporation pursuant to the provisions of chapter four hundred twenty-eight of the laws of nineteen hundred sixty, as amended by a chapter of the laws of nineteen hundred sixty-one, during the term or duration of such lease. Such license may also include such suitable space outside of the licensed premises and adjoining it as may be approved by the liquor authority.

§ 2. Section sixty of such law is hereby amended to read as follows:

§ 60. Kinds of licenses. The following kinds of licenses may be issued for the manufacture and sale of liquor, alcohol and spirits, to wit:

1. Distiller's license, class A.
2. Distiller's license, class B.
- 2-a. Distiller's license, class C.
3. Wholesaler's license.
4. License to sell liquor at retail for consumption off the premises.
5. License to sell liquor at retail for consumption on the premises.
6. *Special license to sell liquor at retail for consumption on the premises.*

§ 3. Subdivision one of section sixty-four of such law is hereby amended to read as follows:

1. **[Any]** *Notwithstanding the provisions of subdivision two of section seventeen of this chapter, any person may make an application to the appropriate board for a license to sell liquor at retail to be consumed on the premises where sold, and such licenses shall be issued to all applicants except for good cause shown.*

*Appendix A*

§ 4. Such law is hereby amended by adding thereto a new section, to be section sixty-four-a, to read as follows:

§ 64-a. *Special license to sell liquor at retail for consumption on the premises.* 1. On or before March first, nineteen hundred sixty-five, any license issued under section sixty-four of this article may be converted into a special on-premises license under this section upon the granting of a request for conversion filed with the liquor authority by the holder of said license. Such a request shall be granted by the authority except for good cause shown. The granting of such a request shall constitute conversion of said license into a special on-premises license subject to the provisions of this chapter applicable to special on-premises licenses issued under this section.

2. On or after October first, nineteen hundred sixty-four, any person may make an application to the appropriate board for a special license to sell liquor at retail to be consumed on the premises where sold.

3. Such application shall be in such form and shall contain such information as shall be required by the rules of the liquor authority and shall be accompanied by a certified check, bank-officers' check or draft, or money order in the amount required by this article for such license.

4. Section fifty-four shall control so far as applicable the procedure in connection with such application.

5. Such special license shall in form and in substance be a license to the person specifically licensed to sell liquor at retail to be consumed on the premises specifically licensed. Such license shall also be deemed to include a license to sell wine and beer at retail to be consumed under the same terms and conditions, without the payment of any additional fee.

6. No special on-premises license shall be granted except for premises in which the principal business shall be

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*(a) the sale of food or beverages at retail for consumption on the premises or (b) the operation of a legitimate theatre or such other lawful adult entertainment or recreational facility as the liquor authority, giving due regard to the convenience of the public and the strict avoidance of sales prohibited by this chapter, shall by regulation classify for eligibility. Nothing contained in this subdivision shall be deemed to authorize the issuance of a license to a motion picture theatre.*

7. No special on-premises license shall be granted for any premises which shall be on the same street or avenue and within two hundred feet of a building occupied exclusively as a school, church, synagogue or other place of worship; the measurements to be taken in a straight line from the center of the nearest entrance of such school, church, synagogue or other place of worship to the center of the nearest entrance of the premises to be licensed; except that no license shall be denied to any premises at which a license under this chapter has been in existence continuously from a date prior to the date when a building on the same street or avenue and within two hundred feet of said premises has been occupied exclusively as a school, church, synagogue or other place of worship.

8. Every special on-premises licensee shall regularly keep food available for sale to its customers for consumption on the premises. The availability of sandwiches, soups or other foods, whether fresh, processed, pre-cooked or frozen, shall be deemed compliance with this requirement. The licensed premises shall comply at all times with all the regulations of the local department of health. Nothing contained in this subdivision, however, shall be construed to require that any food be sold or purchased with any liquor, nor shall any rule, regulation or standard be promulgated or enforced requiring that the sale of food be substantial or

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*that the receipts of the business other than from the sale of liquor equal any set percentage of total receipts from sales made therein.*

*9. The liquor authority may make such rules as it deems necessary to carry out the provisions of this section.*

§ 5. Subdivision four of section sixty-six of such law, as last amended by chapter two hundred four of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

4. The annual fee for a license to sell liquor at retail to be consumed on the premises where sold shall be fifteen hundred dollars in the counties of New York, Kings, Bronx and Queens; ten hundred dollars in the county of Richmond and in cities having a population of more than one hundred thousand and less than one million; seven hundred fifty dollars in cities having a population of more than fifty thousand and less than one hundred thousand; and the sum of five hundred dollars elsewhere; except that the license fees for catering establishments shall be two-thirds and for clubs, except luncheon clubs and golf clubs, shall be one-half the license fee specified herein. The annual fees for luncheon clubs shall be three hundred seventy-five dollars, and for golf clubs in the counties of New York, Kings, Bronx, Queens, Nassau, Richmond and Westchester, two hundred fifty dollars, and elsewhere one hundred eighty-seven dollars and fifty cents. *The annual fee for a special license to sell liquor at retail to be consumed on the premises where sold shall be seventeen hundred dollars in the counties of New York, Kings, Bronx and Queens; twelve hundred dollars in the county of Richmond and in cities having a population of more than one hundred thousand and less than one million; nine hundred fifty dollars in cities having a population of more than fifty thousand and less than one hundred thousand; and the sum of seven hundred*

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*dollars elsewhere.* Provided, however, that where *any premises for which a license is issued pursuant to section sixty-four or sixty-four-a of this article remain* [a hotel, restaurant or club remains] open only within the period commencing April first and ending October thirty-first of any one year, the liquor authority may, in its discretion, grant to the person owning or operating such *premises* [hotel, restaurant or club] a summer license effective only for such period of time, for which a license fee shall be paid to be pro-rated for the period for which such license is effective, at the rate provided for in the city, town or village in which such [hotel, restaurant or club is] *premises are* located, except that no such license fee shall be less than one-half of the regular annual license fee; provided further that where the premises to be licensed [is] *are* a race track or a golf course, the period of such summer license may commence March first and end November thirtieth.

Where a hotel, restaurant, club, golf course or race track is open prior to April first and/or subsequent to October thirty-first by reason of the issuance of a caterer's permit or permits issued by the authority, such fact alone shall not affect the eligibility of the premises or the person owning or operating such hotel, restaurant, club, golf course or race track for a summer license.

§ 6. Section ninety-nine-c of such law, as amended by chapter six hundred fifteen of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§ 99-c. *Special permit authorizing sale on credit.* Notwithstanding any other provision of this chapter to the contrary, any person licensed to sell alcoholic beverages for consumption on the premises pursuant to *section sixty-four of this chapter*, may apply to the liquor authority for a special permit authorizing such licensee to sell alcoholic

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beverages for consumption on the premises on credit, provided such sale is made only as an incident to the sale of food to be consumed on the premises.

The annual fee for such special permit, for any year commencing on or after March first, nineteen hundred forty-eight, and which shall run concurrently with the annual term of the license for on-premises consumption, shall be one thousand dollars in the counties of New York, Kings, Bronx, Queens and Richmond; and eight hundred dollars elsewhere within the state; provided, however, that where a hotel or restaurant remains open only within the period commencing April first and ending October thirty-first of any one year, the liquor authority may, in its discretion, grant to the hotel or restaurant licensee such special permit effective only for such period of time for which the special permit fee to be paid shall be prorated for the period for which such special permit is effective, at the rate provided for in the city, town or village in which such hotel or restaurant is located, except that no such special permit fee shall be less than one-half of the regular special permit fee.

Where application for such special permit under this section is made after the commencement of the license year, the special permit fee therefor shall, for the balance of the license year, be in proportion as the remainder of such year shall bear to the whole year, except that it shall in no case be for less than one-half of such year.

The liquor authority may, in its discretion, and upon such terms and conditions as it may prescribe, issue such a special permit.

§ 7. Section one hundred one-b of such law, as added by chapter eight hundred ninety-nine of the laws of nineteen hundred forty-two, subdivision four thereof having been amended by chapter five hundred fifty-one of the laws of



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nineteen hundred forty-eight, is hereby amended to read as follows:

§ 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund. 1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person [privileged to sell] *who sells* liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and of like age and quality[.]; (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement *of any kind whatsoever*, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of

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wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold **[within the state]** *to or purchased by* a wholesaler, **[or retailer]** *irrespective of the place of sale or delivery*, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. **[(b) The]** *Such* schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, *the number of bottles contained in each case*, the bottle and case price to wholesalers, the *net bottle and case price* **[to retailers]** *paid by the seller*, **[the number of bottles contained in each case,]** which prices, *in each instance*, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. *Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.* **[(c) The]** *Such* schedule **[containing the bottle and case price to wholesalers]** shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

*(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in*

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*effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. [(d) The] Such schedule [containing the bottle and case price to retailers] shall be filed by each manufacturer [and wholesaler who sell brands of liquors or wines] selling such brand to retailers and by each wholesaler selling such brand to retailers.*

**[(e)]** (c) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state *exclusively* by such retailer.

4. Each such schedule shall be filed on or before the tenth day of each month on a date to be fixed by the authority, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licensees. Within three

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business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. [No brand of liquor or wine shall be sold except at the price then in effect unless written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.] All schedules filed shall be subject to public inspection, from the time that they are required to be made available for inspection by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The liquor authority may make such rules as shall be appropriate to carry out the purpose of this section.

5. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, on or before the tenth day after this act becomes a law, there shall be paid to the liquor authority by each manufacturer and wholesaler licensed under this chapter to sell to retailers liquors and/or wines, a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for each such licensee. A like sum shall be paid by each person hereafter applying for any such license or the renewal of any such license, and such sum shall accompany the application and the license fee prescribed by this chapter for such license or renewal as the case may be. In the event that any other law requires the payment of a fee by any such licensee or applicant as set forth in this section

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for schedule listing, then and in such event the total fee imposed by this section and such other law or laws on each such licensee shall not exceed in the aggregate a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for such license.

*6. The authority may revoke, cancel or suspend any license issued pursuant to this chapter, and may recover (as provided in section one hundred twelve of this chapter) the penal sum of the bond filed by a licensee, or both, for any sale or purchase in violation of any of the provisions of this section or for making a false statement in any schedule filed pursuant to this section or for failing or refusing in any manner to comply with any of the provisions of this section.*

§ 8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anticompetitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination.

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§ 9. Subdivision three of section one hundred one-b of such law, as amended by section seven of this act, is hereby amended to add eight new paragraphs, to be paragraphs (d), (e), (f), (g), (h), (i), (j) and (k), to read as follows:

(d) *There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.*

(e) *There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to wholesalers set*

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forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.

(f) There shall be filed in connection with and when filed shall be deemed part of any schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, or by a related person, an affirmation duly verified by such brand owner or such wholesaler designated as agent that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner or such wholesaler designated as agent, or any related person, to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (f), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands.



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(g) *There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month preceding the month in which such schedule is filed.*

(h) *In the event an affirmation with respect to any item of liquor is not filed within the time provided by this section, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of liquor, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule.*

(i) *In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer, as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d), (e), (f) and (g) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this paragraph, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or*

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*the District of Columbia upon or based upon the gallon of liquor, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.*

*(j) Notwithstanding and in lieu of any other penalty provided in any other provisions of this chapter, any person who makes a false statement in any affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than ten thousand dollars or by imprisonment in a county jail or penitentiary for a term of not more than six months or by both such fine and imprisonment. Every affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be deemed to have been made in every county in this state in which the brand of liquor is offered for sale under the terms of said schedule. The attorney general or any district attorney may prosecute any person charged with the commission of a violation of this paragraph. In any such prosecution by the attorney general, he may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties in respect of any such proceeding which the district attorney would otherwise be authorized or required to exercise or perform, and in such prosecution the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney general or his deputy or assistant so attending.*

*(k) Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the liquor authority may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.*

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§ 10. Such law is hereby amended by adding thereto a new section, to be section one hundred one-bb, to read as follows:

§ 101-bb. *Prohibition against retail sales at less than cost.* 1. *It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution within the state of liquor for the purpose of fostering and promoting temperance in its consumption and respect for and obedience to the law. In order to eliminate retail sales of liquor at less than cost which unduly disrupt the orderly sale and distribution of liquor, it is hereby declared as the policy of the state that the sale of liquor should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.*

2. *No licensee authorized to sell liquor at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any item of liquor at a price which is less than cost. As used in this section, the term:*

(a) *"liquor" shall mean liquor bearing a brand or trade name, and of like age and quality, which is contained in a schedule filed with the authority pursuant to section one hundred one-b of this article, and*

(b) *"cost" shall mean the price of such item of liquor to retailers contained in the applicable schedule filed with the authority pursuant to section one hundred one-b of this article and which is in effect at the time such licensee sells, offers to sell, solicits an order for or advertises such liquor at retail. As used in this paragraph (b), the term "price" shall mean bottle price, before any discounts, contained in such schedule.*

3. *Nothing contained in this section, however, shall prevent such licensee from selling, offering to sell or soliciting an order for such liquor at a price less than cost, provided*

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*that prior written permission therefor is granted by the authority for good cause shown and for reasons not inconsistent with the purpose of this chapter and under such terms and conditions as the authority deems necessary.*

*4. The authority is hereby authorized to promulgate rules which are necessary*

*(a) to carry out the purpose of this section and to prevent its circumvention;*

*(b) to permit the sale of liquor which is damaged or deteriorated in quality, or the close-out of a brand for the purpose of discontinuing its sale, at a price which is less than cost and under such terms and conditions as are necessary to carry out the purposes of this section;*

*(c) to permit the sale whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee affected by this section or because of acts or circumstances beyond the control of such licensee, at a price which is less than cost and under such terms and conditions as are necessary to carry out the purposes of this section.*

*5. For the violation of any provision of this section or of any rule duly promulgated under this section, the authority may: for a first offense, suspend a license for a period not exceeding ten days; for a second offense, suspend a license for a period not exceeding thirty days; and for a third offense, suspend, cancel or revoke a license. In addition, for any such offense, the authority may recover, as provided in section one hundred twelve of this chapter, the penal sum of the bond filed by the licensee.*

*6. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, there shall be paid to the authority by each person hereafter applying for a license as manufacturer, wholesaler and retailer as hereinafter set forth, the following sums: distiller licensee or wholesale liquor licensee, sixty*

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dollars; retail liquor licensee for off-premises consumption, ten dollars. A like sum shall be paid by each person hereafter applying for the renewal of any such license, and such sums shall accompany the application and the license fee prescribed by this chapter for such license or renewal thereof, as the case may be. The fees prescribed by this subdivision shall not be pro-rated for any portion of the license year and shall have no refund value.

§ 11. Section one hundred one-c of such law, as added by chapter six hundred eighty-nine of the laws of nineteen hundred fifty, is hereby **repealed**.

§ 12. Such law is hereby amended by adding thereto a new section, to be section one hundred one-bbb, to read as follows:

§ 101-bbb. *Minimum consumer resale prices of wine.* 1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale and distribution of wine for the purpose of promoting the orderly sale and distribution thereof. It is hereby declared as the policy of the state that the sale of wine should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. No manufacturer or wholesaler of wine shall sell, offer for sale, solicit any order for or advertise any wine, the container of which bears a label stating the brand or the name of the owner or producer, unless a schedule of minimum consumer resale prices for each such brand of wine shall first have been filed with the liquor authority, and such schedule is then in effect, except that written permission therefor may be granted by the authority for good cause shown and for reasons not inconsistent with the purposes of this section and under such terms and conditions as the authority deems necessary.

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3. (a) Such schedule shall be filed by (1) the manufacturer or wholesaler who owns such brand, if licensed by the authority, or (2) a wholesaler, selling such brand, who is appointed as exclusive agent, in writing, by the brand owner for the purpose of filing such schedule, if the brand owner is not licensed by the authority, or (3) any wholesaler, with the approval of the authority, in the event that the owner of such brand does not file or is unable to file a schedule or designate an agent for such purpose.

(b) Such schedule shall be in writing duly verified, and filed in the number of copies and in the form required by the authority, and shall contain with respect to each brand, the brand or trade name, capacity of the container, nature of contents, age and proof where stated on the label, the minimum consumer resale price of a bottle and/or a case, but not a multiple of a bottle price or a case price or a fraction of a case price. Such prices shall be uniform throughout the state.

(c) The first schedule shall be filed on or before the tenth day of September, nineteen hundred sixty-four on a date to be fixed by the authority, and the prices therein set forth shall become effective on the first day of November, nineteen hundred sixty-four and shall remain in effect for the months of November and December, nineteen hundred sixty-four. Subsequent schedules shall be filed at the times and for the periods hereinafter set forth and shall be effective during the periods hereinafter set forth:

<i>Filing Date</i>	<i>Effective Dates</i>
November 1-10	January 1-February 28
January 1-10	March 1-April 30
March 1-10	May 1-June 30
May 1-10	July 1-August 31
July 1-10	September 1-October 31
September 1-10	November 1-December 31

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(d) *Provided, however, nothing contained herein shall require any manufacturer or wholesaler to file a schedule of minimum consumer resale prices for any brand of wine offered for sale or sold (1) to a retailer under a brand which is owned exclusively by such retailer and sold within the state exclusively by such retailer; (2) to a consumer or to a church, synagogue or religious organization under a brand which is owned exclusively by such manufacturer or wholesaler, if authorized to sell wine to such persons and such wine is sold exclusively to such persons; (3) to on-premises retailers under a brand which is owned exclusively by such manufacturer or wholesaler and is sold by such manufacturer or wholesaler exclusively to such retailers for consumption on the premises.*

4. *Within ten days after the filing of such schedules the authority shall make them or a composite thereof available for inspection by licensees. All schedules so filed shall be subject to public inspection, from the time that they are required to be made available for inspection to licensees. Each manufacturer and wholesaler shall retain in his licensed premises a copy of his filed schedules. The authority shall, as soon as practicable after the tenth day of the month in which such schedules are filed compile, publish and furnish to each manufacturer or wholesaler of wine and to each retailer authorized to sell wine for off-premises consumption, a list, to be designated "minimum consumer resale price list for wine". Such list as then in effect shall be conspicuously displayed within the interior of licensed premises where sales are made and where they can be readily inspected by consumers.*

5. *No licensee authorized to sell wine at retail for off-premises consumption shall sell, offer to sell, solicit an order for or advertise any wine at a price less than the minimum consumer resale price then in effect, unless written permis-*



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sion of the authority is granted for good cause shown and for reasons not inconsistent with the purposes of this section and under such terms and conditions as the authority deems necessary.

6. The authority is hereby authorized to promulgate rules which are necessary

(a) to carry out the purpose of this section and to prevent its circumvention by the offering or giving of any rebate, allowance, free goods, discount or any other thing or service of value;

(b) to permit the withdrawal of, an addition to, a deletion from, or an amendment of any schedule or a modification of prices therein, when not inconsistent with the purposes of this section, whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee affected by this section or because of acts or circumstances beyond the control of such licensee, and under such terms and conditions as are necessary to carry out the purposes of this section;

(c) to permit the sale at a price less than the minimum consumer resale price of wine which is damaged or deteriorated in quality, or the close-out of a brand for the purpose of discontinuing its sale, under such terms and conditions as are necessary to carry out the purposes of this section;

(d) to permit the sale by a retailer of a brand of wine for which a schedule of minimum consumer resale prices has not been and cannot be filed, whenever necessary to avoid practical difficulties or unnecessary hardships to any licensee affected by this section or because of acts or circumstances beyond the control of such licensee, and under such terms and conditions as are necessary to carry out the purposes of this section.

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7. *For the violation of any provision of this section or of any rule duly promulgated under this section, the authority may suspend, cancel or revoke a license as follows: for a first offense, not exceeding ten days suspension of license; for a second offense, not exceeding thirty days suspension of license; and for a third offense, the authority may suspend, cancel or revoke the license. In addition, for any such offense, the authority may recover, as provided in section one hundred twelve, the penal sum of the bond filed by the licensee.*

8. *For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, there shall be paid to the authority by each person hereafter applying for a license as manufacturer, wholesaler and retailer as hereinafter set forth, the following sums: winery licensee or wholesale wine licensee, fifty dollars; retail wine licensee for off-premises consumption, ten dollars. A like sum shall be paid by each person hereafter applying for the renewal of any such license, and such sums shall accompany the application and the license fee prescribed by this chapter for such license or renewal thereof, as the case may be. The fees prescribed by this subdivision shall not be pro-rated for any portion of the license year and shall have no refund value.*

§ 13. Subdivisions four and four-a of section one hundred five of such law, subdivision four having been amended by chapter five hundred twenty of the laws of nineteen hundred forty-seven, and subdivision four-a having been amended by chapter five hundred sixty-six of the laws of nineteen hundred forty-one, are hereby **repealed**.

§ 14. Nothing contained in section thirteen of this act shall be construed as impairing or affecting the power of the state liquor authority to determine, in accordance with

*Appendix A*

other provisions of the alcoholic beverage control law, whether public convenience and advantage will be promoted by the issuance of licenses to traffic in alcoholic beverages, the increase or decrease in the number thereof and the location of premises licensed thereby.

§ 15. Subdivision nineteen of section one hundred five of such law, as added by chapter nine hundred twenty-seven of the laws of nineteen hundred fifty-eight, is hereby amended to read as follows:

19. No licensee authorized to sell beer *or liquor* at retail for consumption off the premises shall display any sign on or adjacent to the licensed premises, setting forth the price at which beer *or liquor*, or any brand thereof, is sold or offered for sale, or advertise such price in any other manner or by any other means, except in the interior of the licensed premises.

§ 16. Subdivisions four and nine of section one hundred six of such law, paragraph (d) of subdivision nine having last been renumbered and amended by chapter four hundred sixty-seven of the laws of nineteen hundred fifty-five, are hereby amended to read, respectively, as follows:

4. (a) No liquors and/or wines shall be sold or served in [such licensed] premises *licensed under section sixty-four or clause (a) of subdivision six of section sixty-four-a of this chapter*, except at tables where food may be served and except as provided by subdivision four of section one hundred.

(b) *No liquors and/or wines shall be sold or served in premises licensed under clause (b) of subdivision six of section sixty-four-a of this chapter, except at such times and upon such conditions and by the use of such facilities as the liquor authority, by regulation, may prescribe with*

*Appendix A*

*due regard to the convenience of the public and the strict avoidance of sales prohibited by this chapter.*

9. No restaurant and no premises licensed to sell liquors and/or wines for on-premises consumption under clause (a) of subdivision six of section sixty-four-a of this chapter shall be permitted to have:

(a) Any screen, blind, curtain, article or thing covering any part of any window on said licensed premises, which prevents a clear and full view into the interior of said premises from the sidewalk at all times;

(b) Any swinging entrance door;

(c) Any box, stall, partition or any obstruction which prevents a full view of the entire room by every person present therein; and

(d) **[.]** Any opening or means of entrance or passage-way for persons or things between the licensed premises and any other room or place in the building containing the licensed premises, or any adjoining or abutting premises, unless such licensed premises are in a building used as a hotel and serves as a dining room for guests of such hotel; or unless such licensed premises are in a building owned or operated by any county, town, city, village or public authority or agency, in a park or other similar place of public accommodation. All glass in any window or door on said licensed premises shall be clear and shall not be opaque, colored, stained or frosted.

§ 17. Paragraph (d) of subdivision three of section one hundred seven of such law is hereby amended to read as follows:

(d) Form of notice for on-premises license. Notice is hereby given that license (fill in beer, liquor or wine as the case may be, and license number) has been issued to the undersigned to sell (beer, liquor or wine, as the case may be)

*Appendix A*

at retail in a (hotel, club, restaurant, vessel, [or] car, or other type of establishment, as the case may be) under the alcoholic beverage control law at (fill in street address, city, town or village and county in which licensed premises are located) for on-premises consumption.

(Name of licensee)

(Address of licensee)

§ 18. Paragraph (b) of subdivision four of section one hundred seven-a of such law, such subdivision having been added by chapter two hundred four of the laws of nineteen hundred sixty-three, is hereby amended to read as follows:

(b) An application for registration of a brand or trade name label shall be filed by (1) the owner of the brand or trade name if such owner is licensed by the authority, or (2) a wholesaler selling such brand who is appointed as exclusive agent, in writing, by the owner of the brand or trade name for the purpose of filing such application, if the owner of the brand or trade name is not licensed by the authority, or (3) any wholesaler, with the approval of the authority, in the event that the owner of the brand or trade name does not file or is unable to file such application or designate an agent for such purposes, or (4) any wholesaler, with the approval of the authority, in the event that the owner of the brand or trade name is a retailer who does not file such application, provided that the retailer shall consent to such filing by such wholesaler. Such retailer may revoke his consent at any time, upon written notice to the authority and to such wholesaler.

Unless otherwise permitted or required by the authority, the application for registration of a liquor or wine brand or trade name label filed pursuant to this section shall be filed by the same licensee filing schedules pursuant to sections one hundred one-b and one hundred [one-c] one-bbb of this chapter.

*Appendix A*

Cordials and wines which differ only as to fluid content, age, or vintage year, as defined by such regulations, shall be considered the same brand; and those that differ as to type or class may be considered the same brand by the authority where consistent with the purposes of this section.

§ 19. Subdivision one of section one hundred forty-one of such law, as amended by chapter four hundred twenty-six of the laws of nineteen hundred thirty-nine, is hereby amended to read as follows:

1. Not less than forty-five days nor more than sixty days before the general election in the year nineteen hundred thirty-five in any town, and before any subsequent general election in the town at which the submission of the questions hereinafter stated is authorized by this article, a petition signed by electors of the town to a number amounting to twenty-five per centum of the votes cast in the town for governor at the then last preceding gubernatorial election, acknowledged by the signers or authenticated by witnesses as provided in the election law in respect of a designating petition, requesting the submission at such election to the electors of the town of the questions contained in either group A or group B, may be filed with the town clerk:

**GROUP A**

Question 1. Selling alcoholic beverages to be consumed on the premises where sold. Shall any person be authorized to sell alcoholic beverages at retail to be consumed on [the] premises [where sold in (here insert the name of the town)] *licensed pursuant to the provisions of section sixty-four of this chapter?*

Question 2. *Selling alcoholic beverages to be consumed on the premises where sold. Shall any person be authorized to sell alcoholic beverages at retail to be consumed on*

## Appendix A

*premises licensed pursuant to the provisions of section sixty-four-a of this chapter?*

Question [2.] 3. Selling alcoholic beverages not to be consumed on the premises where sold. Shall any person be authorized to sell alcoholic beverages at retail not to be consumed on the premises where sold in (here insert the name of the town)?

Question [3.] 4. Selling alcoholic beverages by hotel keepers only. Shall any person be authorized to sell alcoholic beverages at retail to be consumed on the premises where sold but only in connection with the business of keeping a hotel (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?

Question [4.] 5. Selling alcoholic beverages by summer hotel keepers only. Shall any person be authorized to sell alcoholic beverages at retail to be consumed on the premises where sold but only in connection with the business of keeping a summer hotel within the period from May first to October thirty-first, in (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?

## GROUP B

Question 1. Selling liquor or wine to be consumed on the premises where sold. Shall any person be authorized to sell liquor or wine at retail to be consumed on [the] premises [where sold in (here insert the name of the town)] *licensed pursuant to the provisions of section sixty-four of this chapter?*

Question 2. *Selling liquor or wine to be consumed on the premises where sold. Shall any person be authorized to sell liquor or wine at retail to be consumed on premises licensed pursuant to the provisions of section sixty-four-a of this chapter?*



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Question **[2.] 3.** Selling liquor or wine not to be consumed on the premises where sold. Shall any person be authorized to sell liquor or wine at retail not to be consumed on the premises where sold in (here insert the name of the town)?

Question **[3.] 4.** Selling liquor or wine by hotel keepers only. Shall any person be authorized to sell liquor or wine at retail to be consumed on the premises where sold but only in connection with the business of keeping a hotel in (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?

Question **[4.] 5.** Selling liquor or wine by summer hotel keepers only. Shall any person be authorized to sell liquor or wine at retail to be consumed on the premises where sold but only in connection with the business of keeping a summer hotel within the period from May first to October thirty-first, in (here insert the name of the town), if the majority of the votes cast on the first question submitted are in the negative?

§ 20. If any provision of any section of this act or the application thereof to any person or circumstance shall be adjudged invalid by a court of competent jurisdiction, such order or judgment shall be confined in its operation to the controversy in which it was rendered, and shall not affect or invalidate the remainder of any provision of any section of this act or the application of any part thereof to any other person or circumstance and to this end the provisions of each section of this act are hereby declared to be severable.

§ 21. The sum of one hundred thousand dollars (\$100,000), or so much thereof as may be necessary, is hereby appropriated to the state liquor authority, payable on the audit and warrant of the state comptroller on vouch-

*Appendix A*

ers certified or approved by the chairman of the authority, out of moneys in the state treasury not otherwise appropriated, in order to carry out the provisions of this act.

§ 22. Sections thirteen, fourteen, twenty and twenty-one of this act shall take effect immediately; sections one, two, three, four, five, six, sixteen, seventeen and nineteen of this act shall take effect June first, nineteen hundred sixty-four; and sections seven, eight, nine, ten, eleven, twelve, fifteen and eighteen of this act shall take effect October thirty-first, nineteen hundred sixty-four, except that those provisions of section twelve of this act requiring the filing of schedules on or before September ten, nineteen hundred sixty-four shall take effect September first, nineteen hundred sixty-four.

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ROBERT K. KENNEDY  
Acting Solicitor General

ROBERT L. KENNEDY  
Assistant Attorney General

U. S. DEPARTMENT OF JUSTICE

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A State is not required to gear its police power measures to their merchandising maneuvers in which the industry affected engages for its profit. It is on such that appellants base their contentions of difficulty of compliance and their due process argument. Moreover their contentions are sheerly conjectural and speculative and are in fact contradicted by the pricing operations which obtain in the industry in and outside New York State.

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No. 545

# Supreme Court of the United States

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October Term, 1965

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*  
*against*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,  
ROBERT E. DOYLE, constituting the State Liquor  
Authority, and LOUIS J. LEFKOWITZ, Attorney Gen-  
eral of the State of New York,

*Appellees.*

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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## BRIEF FOR APPELLEES

### Statement

Plaintiffs have appealed from the order of the Court of Appeals of the State of New York holding in all respects valid and constitutional the provisions of the Alcoholic Beverage Control Law of the State of New York challenged by the plaintiffs in this action. The order affirmed the unanimous affirmance of the Appellate Division, Third Judicial Department of the State of New York, which had affirmed the judgment of the Supreme Court of the State of New York which had denied plaintiffs' motion for preliminary injunction and granted defendants' motion for declaratory judgment declaring the statutory provisions constitutional and valid.

This Court noted probable jurisdiction on November 22, 1965 (15 L. ed. 2d 338).

The statutory provisions challenged have not yet been put into effect<sup>1</sup> because plaintiffs obtained a stay on October 29, 1964, the eve of the effective date of the sections (October 31, 1964). The stay was in effect by its terms until the date of the order and judgment of the Court of first instance (April 19, 1965). Thereafter, in lieu of plaintiffs' inevitable application for further stays, the State Liquor Authority refrained from putting the provisions into effect while the appeals were pending first in the Appellate Division (which issued its order of affirmance on May 14, 1965) and then in the Court of Appeals (where the appeal was argued on May 27, 1965). After the Court of Appeals decision on July 9, 1965, Chief Judge DESMOND granted plaintiffs application for a stay pending their application therefor to Mr. Justice HARLAN. Mr. Justice HARLAN granted the stay on August 5, 1965. This stay is now in effect.

### **The Action**

This action was brought by 62 distillers, wholesalers and importers of alcoholic beverages for a judgment declaring invalid two sections of a 1964 general amendment of the New York Alcoholic Beverage Control Law (Chapter 531, 1964 Laws of New York)<sup>2</sup>. The challenged sections of

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<sup>1</sup> Therefore, (*infra*, pp. 49 *et seq.*) all of appellants' arguments as to the effect of the provisions on their business operations are necessarily conjectural and speculative (in addition to having no bearing on the constitutionality of the provisions).

<sup>2</sup> The New York Alcoholic Beverage Control Law (hereinafter sometimes cited as the "ABC Law") regulates the manufacture, sale and distribution of alcoholic beverages within the State of New York. Those who would traffic in alcoholic beverages within the State are required to be licensed by the State.

Chapter 531 are Section 9 and certain provisions of Section 7. Both of these sections amended Section 101-b of the ABC Law which, as its title indicates, covers the subject of "Unlawful Discriminations" in pricing and the "filing of schedules" of prices to wholesalers and retailers with the State Liquor Authority. The text of Sections 7 and 9 of Chapter 531 is set forth in Appendix B hereto.

The concentration of plaintiffs' attack has throughout the litigation been upon Section 9.

The statutory provisions which are the subject of the action will be more fully discussed *infra* under the subheading "The 1964 Liquor Law". In this introductory portion of this brief we note the essence of the provisions, *viz.*:

Section 9 provides that as part of the monthly schedules of brand owners', distillers' or manufacturers' prices to wholesalers, and of wholesalers' prices to retailers, which schedules, since 1942, are required by Section 101-b of the New York ABC Law to be filed for the ensuing month with the State Liquor Authority, there must also be filed an affirmation verified by the brand owner or his designee that the brand price in the schedules is no higher than the lowest price at which the same item of liquor was sold by the brand owner or his designee, or by any related person,<sup>3</sup> to any wholesaler or retailer in any other State of the United States at any time in the month immediately preceding.

The provisions of Section 7 of Chapter 531, amending Section 101-b, subdivision 3(a) of the ABC Law, which the appellants attack are the following: The provision that price schedules must contain "the net bottle and case

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<sup>3</sup> "Related person" is defined in Section 9 in paragraphs (d) and (f).

price paid by the seller." Necessarily this means the bottle and case price when the seller has *paid* a bottle and case price. The other is that which provides that the prohibition against sale to or purchase by a wholesaler, unless price schedules are filed, applies "irrespective of place of sale or delivery". Necessarily this affects only wholesalers licensed to sell in New York (Alcoholic Beverage Control Law Section 105[16], sale to or purchase by wholesalers for resale in New York, and the monthly schedules of prices in New York, required to be filed by New York licensees. State Liquor Authority Rule 16, Part 65 § 65.6 [b] [3], § 65.1 [a] [1]). The words "irrespective of place of sale or delivery" were added to eliminate any contentions that sale is not in New York when a New York wholesaler takes delivery at out-of-state distilleries (see *infra*, p. 9).

### Question Presented

In appellants' "Questions Presented" (Br., pp. 3-4) they have incorporated their contentions of the effect of the statutory provision they attack upon their business operations and they have incorporated their arguments as if these were the undisputed and indisputable facts on which their challenge of constitutionality of the statutes is to be answered.

These are not the "Questions". They are the very things this Court would have to accept and decide to be proper bases upon which the constitutionality of statutes are determined. The State Courts did not accept them.

The Question Presented on this appeal, in this Court, is single. It is this:

May the State constitutionally provide by statute that, in respect to the monthly schedules of brand prices of

liquor required to be filed by brand owners and wholesalers of liquor (who must be licensed by the State in order to sell their products in the State and are regulated by the State), there must also be filed a verified affirmation by the brand owner that such brand prices in New York State to wholesalers and to retailers are no higher than the lowest prices at which such brands were sold in the preceding month in the United States outside New York State to wholesalers and to retailers by the brand owner, or by any person who has the status of a related person—as defined in the statute—to the brand owner, and that wholesalers who themselves sell elsewhere in the United States outside the State of New York make similar affirmation as to their own prices to retailers?

### **Opinions of the Courts of the State of New York**

The opinions of the New York Court of Appeals (July 9, 1965) are reported in 16 N. Y. 2d 47, 209 N. E. 2d 85, 262 N. Y. S. 2d 453.

The opinion of the New York Appellate Division, Third Department (May 13, 1965), is reported in 23 N. Y. A. D. 2d 933, 259 N. Y. S. 2d 644.

The opinion of the New York Supreme Court, Albany County (April 8, 1965), is reported in 45 Misc. 2d 956, 258 N. Y. S. 2d 442.

The essentials in the opinions of the New York State Courts are set forth here:

#### **Court of Appeals Opinion**

1. **Price Discrimination**—"It [the Moreland Commission] found in effect gross price discrimination against the New York consumer by the industry". (16 N. Y. 2d p. 54).



## 2. Legislative Purpose in 1964 Amendment of ABC Law

—“[I]ts [the Commission’s] studies showed no correlation between consumption and prices, looking at the experience in States in which prices were high compared with those in which they were low”. “The result was the enactment of a statute by the Legislature \* \* \* which, among other things vitally changed the direction of liquor price policy in New York and sought to reduce consumer prices”. “[T]he Legislature by Section 9 \* \* \* set up means which sought to keep down the prices of brand liquors to the consumer”. (16 N. Y. 2d at pp. 54, 55).

“Thus it was sought to end the discrimination by the liquor industry against the New York consumer.” (16 N. Y. 2d at p. 55).

## 3. Twenty-first Amendment; State Police Power—“It is thoroughly settled that when it comes to the regulation of liquor traffic a wide area of public power may be exercised in plenary fashion by State governments without Federal interference either under the commerce clause or under the equal protection provisions of the Constitution”<sup>4</sup> (16 N. Y. 2d at p. 57). “[T]he Twenty-first amendment spells out \* \* \* specific and federally protected right of each State to eliminate as well as regulate the liquor traffic within its borders”<sup>5</sup> (16 N. Y. 2d at p. 56).

On the States’ power “in matters affecting the welfare of a State and its people, liquor aside,” the Court cited *Hoopeston Co. v. Cullen*, 318 U. S. 313; *Huron Cement Co. v. Detroit*, 362 U. S. 440; *Osborn v. Ozlin*, 310 U. S. 53, (16 N. Y. 2d at p. 59).

<sup>4</sup> Discussing (16 N. Y. 2d at pp. 57-58) *State Board v. Young’s Market*, 299 U. S. 59; *Mahoney v. Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395; *Ziffrin, Inc. v. Reeves*, 308 U. S. 132. The opinion distinguished (p. 58) *United States v. Frankfort Distilleries*, 324 U. S. 293; *Hostetter v. Idlewild Liq. Corp.*, 377 U. S. 324; *Department of Revenue v. James Beam Co.*, 377 U. S. 341.

<sup>5</sup> Citing *Mahoney v. Triner Corp.*, 304 U. S. 401.

4. **Regulation of Liquor Industry**—"A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics or furniture." (16 N. Y. 2d at p. 56).
  5. **Due Process**—"If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of opinion they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers." "In light of \* \* \* [the] national marketing situation, the actual difficulty of the distiller in seeing to it that the New York buyer pays no more than 'the lowest price elsewhere' seems greatly overstressed." (16 N. Y. 2d pp. 56, 57).
  6. **Monopoly States Pricing Compared**.—Testimony of Moreland Commissioner Walsh is quoted citing "Pennsylvania, a monopoly State, 'the largest purchaser of liquor in the world \* \* \* \$400,000,000 worth of liquor a year—one customer' " \* \* \* "an example of a customer who insists 'on the lowest price that the distiller offers anywhere in the country.' "
- \* \* \*
- "The requirement of section 9 is not, indeed, unusual in concept and those States which have State liquor monopolies, we are told, require the distillers to warrant that the price charged the State monopoly for brand liquors is no higher than the price charged in other States. Thus we think the price regulation in the 1964 statute is neither impossible of compliance nor unreasonable." (16 N. Y. 2d at p. 57).
7. **Interstate Commerce**—"In effect the dependence of the New York price on the maximum price of the

distiller for his brand elsewhere is to tie the price in this State into a national price. There is nothing unreasonable about that. It is not an interference with interstate commerce. The effect is on what the distiller charges here and is an effect closely associated with the sale and distribution of liquor within the State.

"That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a device within the power of the State to employ in this regulated activity."

"The incidental effect of this on prices in another State does not invalidate the New York statute." (16 N. Y. 2d at pp. 56, 57).

8. **Anti-Trust; Robinson-Patman Act**—"The provisions of section 9 are not transformed into an 'anti-trust measure' in conflict with the supremacy cause on the basis of plaintiffs' conception that the statute is not 'a device to promote temperance'; nor are they for similar reasons in conflict with the Robinson-Patman Act. \* \* \* It is a strained argument to make, as plaintiffs do, that compliance with the compulsion of a public statute which seeks to keep down the price of liquor is the equivalent of an unlawful conspiracy to violate the Sherman Act." (16 N. Y. 2d at p. 59).

The opinion concluded as to plaintiffs' argument that the 1964 statute is not suited to the promotion of temperance and hence the main justification of a valid regulation of liquor is lost, with this comment: "As to what best promotes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry." (16 N. Y. 2d, at pp. 59, 60).

To plaintiffs' attack upon portions of § 7, the Court's response was (16 N. Y. 2d, p. 59):

"The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intrastate sale of liquor."

This construction of a New York statute by the State's highest court, this Court will accept as "binding" upon it. *N. A. A. C. P. v. Button*, 371 U. S. 415, 432 (1963). As Mr. Justice BRENNAN said in that case:

"For us the words of Virginia's highest court are the words of the statute \* \* \* 'we are not left to speculate at large upon the possible implications of bare statutory language.'"

The basis of the dissenting opinion was that the statute was not justified as a police power exercise. (16 N. Y. 2d, at p. 60).

#### Appellate Division Opinion

##### 1. Price Discrimination; Legislative Policy in 1964 Amendment of ABC Law.—

"The legislative policy sought to be effectuated by the amendments in dispute was declared to be, among other things, to foster price competition, to *eliminate discrimination against New York consumers* and 'to forestall possible monopolistic and anti-competitive practices *designed to frustrate the elimination of such discrimination*', price discrimination and favoritism being found 'contrary to the best interests and welfare of the people of this state'." (23 N. Y. A. D. 2d, at p. 934; Italics ours)

2. **Police Power**—"[T]he enactment constitutes a valid exercise of the police power." (23 N. Y. 2d at p. 934).
3. **Robinson-Patman Act; Sherman Act; Supremacy Clause; Commerce Clause**—"Appellants argue forcefully that the maximum price provisions of the amendments contravene the Robinson-Patman Act \* \* \* and the Sherman Act \* \* \* and thus are violative of the supremacy clause and that the challenged amendments offend the commerce clause as well. The complete answer is, we believe, that the legislation lies well within the area of liquor traffic regulation, in which, under the Federal Constitution, effective control may be exercised by the States" (23 N. Y. A. D. 2d at p. 934, citing the Twenty-first Amendment and the classic decisions of this Court under the Amendment, and distinguishing *Frankfort Distillers*, the *Idlewild* case and *Department of Revenue v. Beam*).
4. **Due Process**—"The enactment \* \* \* effects no deprivation of due process." (23 N. Y. A. D. 2d, at p. 934).
5. **Equal Protection**—"Neither in the record nor in appellants' argument do we find a substantial basis for the assertion that equal protection has been denied." (23 N. Y. A. D. 2d, at p. 934).
6. **Other Contentions**—"Appellants' remaining contentions seem to us unsubstantial and do not require discussion." (23 N. Y. A. D. 2d at p. 934).

#### **State Supreme Court Opinion**

Justice STALEY's opinion in the Court of first instance weighed *seriatim* the allegations of the complaint and all of plaintiffs' arguments and passed upon all of them. On each of the arguments raised by plaintiffs he held to the same effect as did, subsequently, the Appellate Division and the Court of Appeals:

### 1. Due Process—

"Courts no longer employ the due process clause of the Constitution to invalidate State laws regulatory of business and industrial conditions merely because such laws are deemed unwise or improvident. (*Williamson v. Lee Optical Co.*, 348 U. S. 483. \* \* \*).

"Nor will the court sit as a superlegislature to weigh the wisdom of each enactment brought before it, or decide whether policy which it expresses offends the welfare of a particular group. (*Day-Brite Light v. Missouri*, 342 U. S. 421 \* \* \*).

"Nor are legislative enactments rendered invalid as a denial of due process or equal protection under the law because they impose financial hardship, result in reduced income or make it impossible for some to continue in a particular business. (*California Auto. Assn. v. Maloney*, 341 U. S. 105; *Breard v. Alexandria*, 341 U. S. 622; *Day-Brite Light v. Missouri*, *supra*; \* \* \*).

"Plaintiffs' attack on chapter 531 on the basis that it deprives them of liberty and property without due process of law \* \* \*, allege economic hardships, possible reduced profit margins, expenditures for new equipment, possible difficulty in increasing prices and difficulty in competing in other States. These allegations, even if proven, have no bearing on the constitutionality of the statute. (*California Auto. Assn. v. Maloney*, *supra*; *Breard v. Alexandria*, *supra*; *Day-Brite Light v. Missouri*, *supra*; \* \* \*)." (45 N. Y. Misc. 2d, at pp. 961, 962).

### 2. Police Power—"Being an enactment under the police power of the State, the strongest presumption of validity attaches to chapter 531 of the Laws of 1964 and the fact that it causes or might cause an economic hardship to those whom it affects is no argument against its constitutional validity, if it is an otherwise valid exercise of the State's police power. "The choice of measures is for the Legislature who are presumed to have investigated the subject and to have acted with reason not from caprice. 'Legis-

lation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate.' (*People v. Griswold*, 213 N. Y. 92, 97.)" (45 N. Y. Misc. 2d at p. 962).

3. **Price Discrimination; Difficulty of Compliance**—"The provisions of chapter 531 requiring filing price schedules and affirmations are not, in and of themselves, either arbitrary or unreasonable. Such filings are certainly appropriate to the purpose intended of preventing consumers in New York State from being discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states. The fact that the plaintiffs might find it difficult to obtain the required information or are limited by the act in the price differentials allowed, does not make the act arbitrary, capricious and unreasonable." (45 N. Y. Misc. 2d, at p. 963).
4. **Equal Protection**—"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' (*Tigner v. Texas*, 310 U. S. 141, 147.) The fact that the Legislature omitted certain ones who might have been included in the statute, does not render it unconstitutional." (45 N. Y. Misc. 2d, at pp. 964, 965).
5. **Twenty-First Amendment**—"There is no doubt that under the Twenty-first Amendment of the Constitution of the United States that the State of New York may \* \* \* regulate, \* \* \* and may also restrict, prevent, regulate and control by taxation or otherwise, the distribution, use or consumption of intoxicants within the State. (*California v. Washington*, 358 U. S. 64; *Department of Revenue v. Beam Dis-*



*tilling Co.*, 377 U. S. 341; *Hostetter v. Idlewild Liq. Corp.*, 377 U. S. 324.)" (45 N. Y. Misc. 2d, at p. 964).

6. **Interstate Commerce**—"The Alcoholic Beverage Control Law of the State of New York concerns itself solely with the regulation and control of the manufacture, sale and distribution within the State of New York of alcoholic beverages. \* \* \* Any effect which it has on interstate commerce is entirely coincidental. The regulation and control of the sale and distribution of alcoholic beverages is a matter of local concern and the mere fact that such regulations have or may have some repercussions upon the activities of a business which operates Nationwide does not invalidate the State action, particularly where the subject of the action is within the police power of the State. (*Osborn v. Ozlin*, 310 U. S. 53; *Southern Pacific Co. v. Arizona*, 325 U. S. 761; *Watson v. Employers Liab. Corp.*, 348 U. S. 66.)" (45 N. Y. Misc. 2d, at p. 964).
7. **Sherman Act; Robinson-Patman Act**—"The commerce clause of the United States Constitution, the Sherman Act and the Robinson-Patman Act are all concerned with interstate commerce as distinguished from intrastate commerce. Since the purpose of the Alcoholic Beverage Control Law is to regulate and control the intrastate sale and distribution of alcoholic beverages, it does not come within the realm of the commerce clause of the United States Constitution nor of the Sherman Act or of the Robinson-Patman Act." (45 N. Y. Misc. 2d, at p. 964).

### **The Genesis of the 1964 Liquor Law**

In 1963 Governor Rockefeller appointed a Moreland Commission to undertake a "thorough study and reappraisal of the [New York Alcoholic Beverage Control] Law with respect to the sale and distribution of alcoholic beverages in the State, to examine and investigate \* \* \* the methods and practices of manufacturers, distributors and

retailers of alcoholic beverages in the State" and to propose any revisions of the law which might be found necessary "in the light of experience and current social and economic conditions" (Executive Order February 15, 1963).

The Governor's announcement of appointment of the Commission and the Executive Order (February 15, 1963) noted that the Alcoholic Beverage Control Law had been enacted in 1934, "following closely" the repeal of Prohibition, and that there had been "no major reappraisal or revision of the law in the light of experience and current social problems and economic conditions".

#### **Liquor Prices and Temperance**

The Commission's "basic re-examination" was not only of the Alcoholic Beverage Control Law but also of "the major assumptions on which it rests". This included an examination of experience to learn whether the statutory provisions relative to distribution promoted temperance. (Moreland Commission Report and Recommendations #1, p. 3)

It was found that "figures show a steadily increasing amount of per capita consumption in the nation and a greater than average increase in New York State" (*id.*, and see *State Monopoly and Price Fixing in Retail Liquor Distribution*, John E. Dunsford, Wisconsin Law Review [May 1962] pp. 454, 480-481, 482, 484); that the theory at the time of repeal that high prices would retard the sale and consumption of liquor was shown by 30 years' experience to have been erroneous (minimum liquor prices had been the statutory result of this theory); that all that minimum prices have accomplished has been to benefit the industry (*cf. State Monopoly and Price Fixing in Retail*

*Liquor Distribution, supra*, pp. 479, 484). What has been traditionally (going back to Colonial times) and was to be after Prohibition a stringently regulated industry, had become a protected industry—protected as no other private industry is protected. The Moreland Commission found (Report #3) that “the argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it is \* \* \* unfounded” (*id.*, p. 17). See *infra* Borregard & Glusker, Yale Law School (1950), *The Distilled Spirits Industry; A Marketing Survey*. “To test the thesis that high prices promote temperance” (Moreland Commission Report #3), the Moreland Commission examined the “high” and “low” price States and the per capita apparent consumption in the States and found no pattern to indicate that high prices and low consumption co-existed, or low prices and high consumption (*id.*, pp. 17-18). It found no discernible relationship between consumption patterns in “low” or “high” price States.

The Commission concluded that all that high consumer prices accomplished was to benefit the industry at the expense of the New York State consumer. The Commission recommended repeal of § 101-c of the Alcoholic Beverage Control Law, which had provided for minimum consumer resale prices fixed by brand owners and enforced by the State Liquor Authority.

The Interim Report of the Commission on August 30, 1963, after six months of study, had queried in respect to § 101-c: “The history of this \* \* \* restriction \* \* \* raises a question as to whether protection of the profitability of the liquor industry is a proper objective” of regulation (p. 12).

On "promotion of temperance" which plaintiffs have all through this litigation urgently contended is the sole permissible purpose of state laws regulating or restraining the liquor industry, the Moreland Commission Report observed (Report #1, p. 3):

"the industry apparently regards as 'temperate' those increases in consumption which accompany 'accepted' merchandising methods, including extensive advertising expenditures. With equal disregard for objective standards of measurement, most of the industry claims that 'temperance' has been fostered by the existing restrictions on the distributive system, but states that it has no means of proving this by reference to any statistics" (*id.*, p. 3).

Appellants, it might be noted, continue in this action this illogical position. While decrying the requirement of § 9 as not conducive to the temperance purpose of the Alcoholic Beverage Control Law,<sup>6</sup> with dramatic inconsistency, the pervading thesis of their case is speculation as to the frustrating effect § 9 would have on the merchandising and pricing practices in which they indulge outside New York State to spur their sales and increase their profits (Br. pp. 28, 58). The vast sums distillers spend on brand advertising are of course for the purpose of stimulating sales (see Moreland Commission Report #3, p. 17) with no qualms as to the effect on temperance.

#### **Wholesale Liquor Prices in New York State**

As to prices in New York State, the Moreland Commission study found that "many retail prices in the District of Columbia are below the cost to New York State retail-

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<sup>6</sup> That all sections of the Alcoholic Beverage Control Law need not promote the temperance purpose of liquor regulation and that the public interest which is generally to be promoted pursuant to the statute, and the State's police power generally, authorize the enactment of § 9 is discussed *infra* Point II.

ers" (Study Paper Number 5, p. 32 [October 28, 1963] by Harold L. Wattel). The following table is set forth in the study paper as illustrative *id.*:

TABLE 13

Retail Prices of Selected Distilled Spirits Brands,  
Washington, D. C., Compared With Wholesale  
Prices of the Same Brands, New York  
State, August-September, 1963

Brand	Fifths	
	Washington, D. C. Retail Price	New York State Wholesale Price
P. M. (Blend)	\$2.85	\$3.45
Old Crow (Straight)	3.39	4.15
Gilbey's Gin	2.87	3.17
Haig and Haig (Scotch)	4.59	5.31
Seagram's V. O. (Canadian)	4.87	5.06

Sources: *Beverage Media*, August, 1963; *Washington Post*, September 4, 1963, and field survey by author.

The final report of the Moreland Commission on Prices (Report #3, January 21, 1964) declares:

"New York *wholesale* prices for packaged whiskey are so high that New York retailers actually pay higher purchase prices in many instances than ultimate consumers pay for the same products in other areas." (pp. 5-6. *Italics in Report.*)

A chart is set forth illustrating and supporting this statement, which compares wholesale prices per Fifth in New York for 18 brands with consumer prices in Washington, Miami and Chicago.

#### Executive and Legislative Action following the Moreland Commission Reports

Following the submission of the Moreland Commission reports on January 21, 1964, Governor Rockefeller on Feb-

ruary 10, 1964, submitted a special message to the Legislature summing up the Commission's conclusions. He noted that the Commission reported "[T]hat the liquor industry has acquired the dominant hold in a field properly regarded as one requiring public regulation; no other industry has its economic interests so uniquely favored with statutory protections; and it is contrary to the public interest to have the regulated industry in such a dominant role".

Among the Commission's goals, said the Governor's special message, had been:

"Bringing justice to the consumer by putting to an end artificial devices whereby the liquor industry has received uniquely beneficial treatment at the consumer's expense."

On the subject of "Distiller-Fixed Consumer Prices", the Governor's message declared that the Commission's findings indicate that

"\* \* \* New York consumers have been compelled to pay on the average \$1 more per fifth of liquor than they would have to pay if there were a free market.  
\* \* \* The total bill for this surcharge foisted on New Yorkers now runs to \$150 million a year and it is rising every year.

"The present system of price control has no significant effect upon the consumption of alcoholic beverages upon temperance or upon the incidence of social problems related to alcohol."

On February 26, 1964 the "Joint Legislative Committee For Study of Alcoholic Beverage Control Law" held a public hearing at which the Moreland Commission Report was discussed.

On behalf of the package stores which opposed the elimination of the minimum consumer price provision (§ 101-C),

there was testimony that such elimination "without wholesale price reductions" would continue to compel present retail prices in order for retailers "to stay in business" (Minutes of the Hearing, p. 300). This testimony continued:

"It is argued that eliminating price stabilization will cause the distillers to lower their prices due to competition among themselves. But it must be emphasized that price stabilization is not price control. *There is no law on the books of the State of New York right now, today, that prevents the distiller from lowering his prices. Therefore, if this free market theory of the Moreland Commission works so well, why then don't the distillers lower their prices right now?* Now it seems clear that it is not retail price stabilization which is at fault, but the level at which prices are being controlled, if they are at all." (Italics ours.)

No liquor legislation passed before the Legislature adjourned its regular session on March 26, 1964.

Three weeks later, Governor Rockefeller convened a Special Session of the Legislature. His Message calling the session asked for repeal of § 101-c, the minimum consumer resale price provision, and also for legislation providing that brand prices in New York State be "certified" to be "at least as low as the price charged in any other State or Washington, D. C."

It was at this Special Session that all of the 1964 amendments to the Alcoholic Beverage Control Law were adopted in one chapter (Chapter 531).

### **The 1964 Liquor Law**

Chapter 531 of the Laws of 1964, adopted at the Special Session amended the Alcoholic Beverage Control Law on several subjects.



The 1964 amendments were designed to eliminate or change provisions of the law enacted closely upon the repeal of Prohibition, pursuant to concepts which, at the time the law was passed, were thought wise regulation of the sale of alcoholic beverages, but which on reappraisal after 30 years were found not to have accomplished the desired purpose or to have produced some evil results, or simply to have the effect of exploiting the purchaser of liquor in New York State to the benefit of the industry.

Two key provisions of the 1964 law (§§ 13-14) eliminating the pre-existing requirement (§ 105, subds. 4 and 4-a) for certain distances between location of package stores, were attacked and upheld by the Court of Appeals of New York in *Martin, et al. v. State Liquor Authority* (15 N. Y. 2d 707)<sup>7</sup> on the opinion of Mr. Justice LAWRENCE H. COOKE in Supreme Court Court [43 N. Y. Misc. 2d 682]).

Section 8 of the 1964 statute stated its purpose in respect to liquor prices:

"8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) *that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that the price discrimination and favoritism are contrary to the best interest and welfare of the people of this state,* and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. *In order to forestall possible*

<sup>7</sup> In that litigation the plaintiffs argued, vehemently, just as plaintiffs do here that the amendment they were attacking was not consonant with the temperance purpose of the Alcoholic Beverage Control Law but rather inimical to that purpose.

*monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination."* (Italics ours.)

Section 11 of the statute repealed § 101-c of the Alcoholic Beverage Control Law which had provided for brand owner fixed minimum resale prices to be enforced by the State Liquor Authority and for violation of which the retailer was subject to suspension, cancellation or revocation of his license and money penalty (§ 101-c, subd. 7).<sup>8</sup>

The goal of bringing down prices was then further implemented by § 9, which amended § 101-b of the Alcoholic Beverage Control Law. The provisions of that section (subd. 3) which for 22 years have required the filing of price schedules by brand owners and wholesalers, were also amended in several details by § 7 of the statute.

### Section 9

We have noted above the essence of § 9, the requirement of the filing of (a) affirmation by the *brand owner* that the filed prices of brands in this state, distiller to wholesaler, for an ensuing month be no more than in any other State or in the District of Columbia in the preceding month, and (b) affirmation by the *brand owner* that its wholesale prices to retailers or the prices of its brands to retailers

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<sup>8</sup> Any hoped for benefit in lower consumer prices from the repeal of this provision has been frustrated by Distillers making "Fair Trade" contracts with retailers pursuant to New York State's Fair Trade Law (New York General Business Law, Art. XXIV-A; see *National Distillers and Chemical Corporation v. Seyopp*, N. Y. Court of Appeals, January 20, 1965).

by wholesalers in this State, which have a related person relationship to the brand owner, are no more than such prices in the preceding month in any other state or in the District of Columbia by the brand owner or a wholesaler which has a related person relationship to the brand owner.

The lowest price outside New York, which § 9 makes the standard for New York prices, is such price after discounts, rebates, free goods, allowances and other inducements to the purchasers in other States. ("i" of § 9 [§ 101-b, subd. 3-i].)

A "related person" is defined in detail in § 9 (¶¶ [d] and [f]) as one related to the brand owner in that (1) the brand owner has in the wholesaler's business direct or indirect stock ownership, standing as lender or lienor, or there are interlocking directors or officers, (2) the exclusive, principal or substantial business of the wholesaler is the sale of the brand owner's product or products, or (3) the wholesaler holds an exclusive franchise from the brand owner. The factors defining a "related person" in item (1) of the definition are similar to those which by pre-existing § 101 (subd. 1, ¶¶ [a], [b]), § 105 (subds. 16, 17), § 106 (subds. 13, 14) constitute relationships interdicted between manufacturers or wholesalers on the one hand and retailers both for on-premises and off-premises consumption. They are thus familiar to distillers, manufacturers and wholesalers doing business in liquor in New York State. See also § 101, subdivision 1 (c).

Wholesalers who are not "related persons" are required to file affirmations only as to their own prices outside New York State, if they sell outside New York State. (§ 9, ¶ [g]. See also ¶ [e].)

### Section 7, Subdivision 3 (a)

The Court of Appeals of New York has construed this provision contrary to appellants' contentions, and such construction this Court accepts as binding (*supra* p. 9; *N. A. A. C. P. v. Button*, 371 U. S. 415, 432). Section 7, will therefore not be additionally discussed in this brief.

### Some Similar Statutory Language in the Alcoholic Beverage Control Law Prior to §9, Construed and Applied by the State Liquor Authority and the Industry for 22 Years.

In their complaint and affidavits plaintiffs pleaded that several words used in Section 9 are vague and that they would be at a loss as to how to comply with such language. As the case moved through the State courts, they abandoned their "vagueness" argument as to one word after another until in this Court, they confine that argument to the word "substantial" (Br. p. 66). We answer this last contention *infra*. Because appellants' complaint and affidavits are in the record in this Court, including their claims of vagueness of other language in Section 9, although no argument thereon is pressed, in Appendix A to this brief we note some language in pre-existing sections of the Alcoholic Beverage Control Law which is the prototype of language in § 9. With the earlier sections, the industry has found it possible to comply for 22 years with, where occasion indicated, guidance from the State Liquor Authority (Phillips' Affidavit on behalf of Defendants' R. 311-314). This rebuts completely appellants' contentions as to such language that it is vague and the appellants would not know what falls within it (*e.g.*, Br. p. 66).

In addition to setting out in Appendix A pre-existing sections using this language, we also compare pre-existing sections using language similar to item 1 of the definition of "related person".

**Some of the Characteristics of the Industry to Which Section 9 Applies in Respect to Merchandising and Pricing Practices.**

The Legislature was not legislating in the abstract when it enacted § 9. It was enacting a regulatory provision to apply to a particular Industry, with, it is to be presumed, an awareness of the distribution and pricing practices of the Industry.

Similarly, appellants' arguments here are not to be considered in the abstract, but in the light of the merchandising and pricing practices of the Industry.

The Industry does not publicize or announce its merchandising and pricing practices. They are, however, matter of common knowledge among those practically acquainted with the Industry. It is, as has been said, to be presumed that the New York State Legislature was aware of the situation when it enacted § 9. The Industry had been the subject, for several years, of study; of a great deal of discussion publicly, in and out of legislative precincts; and, we may be certain, with members of the Legislature. The Legislature could act on its common knowledge, on its pooled general knowledge (*United States v. Carolene Products Co.*, 304 U. S. 144, 152-3).

The Legislature was seeking to achieve lower prices of liquor to consumers in New York, which prices had been found after study to be higher in New York than in many places outside New York. These prices had been state-protected and enforced under § 101-c of the Alcoholic Bever-

age Control Law. The Moreland Commission had found that wholesaler to retailer prices were higher in many instances in New York than retailer to consumer prices elsewhere (*supra*, pp. 17-18). It is to be presumed that the Legislature and its members learned of the operations of the Industry, as to the manner in which wholesale prices are determined, and generally as to the manner in which brand owners market their brands through wholesalers (*cf. Martin v. State Liquor Authority*, 15 N. Y. 2d 707 [1965], *aff'g* Opinion of COOKE, J., 43 N. Y. Misc. 2d 682, 685). It is to be presumed that on this knowledge the Legislature dealt as it did with distiller and wholesaler prices when it also repealed the statutory minimum consumer price provision.

In addition, the merchandising and pricing practices in the Industry can be deduced from distribution patterns and from wholesaler to retailer prices in this State and elsewhere (*infra*). Occasionally something on the subject appears in testimony in litigations. Much is revealed by statements in the very affidavits in this case. And there have been some published objective studies of the industry. The latter all attest to the hold of the manufacturer on the merchandising and pricing of their brands from the time they leave the distiller until they reach the consumer.

The known characteristics of the Industry in respect to merchandising and pricing make clear the reason for and purpose of § 9. They also demonstrate the disingenuousness of appellants' contentions (*e.g.*, Br. pp. 62-63) of problems and of the legal propriety of obtaining information for the purpose of compliance (Br. pp. 28, 45-46).

Appreciation of the merchandising and pricing practices in the industry makes clear indeed that it is not this statute which is incompatible, as appellants argue (Br., Point II),

with anti-monopoly and price anti-discrimination acts but, if anything, current industry practices.<sup>9</sup>

Objective studies have concluded that because of the high degree of concentration in the industry, the "areas in which the autonomous decisions of the wholesaler, retailer or small distiller are significant are correspondingly narrow, \* \* \*. The economist would say that we are dealing with an oligopolistic<sup>10</sup> industry, whose product is a monopolistically differentiated one, and whose pattern of price fixing [was] legally sanctioned" (*The Distiller Spirits Industry: A Marketing Survey*, Borregard & Glusker, Yale Law School [1950] pp. 15-16).

The distilling of whiskey in the United States is in the hands of at most 88 companies (Moreland Commission Study Paper #5, p. 7), which have gross annual sales of nearly \$5 billion. Four of the distillers known in the industry as the "big four" do some 60% of the business of distilling or manufacture and set its pace. These four are among the appellants in this action. Three of the affidavits on behalf of the appellants are made by vice-presidents of three of the "big four" (Lind, Revit, Hermann).

The industry is characterized by its brand consciousness. Each distiller has a number of brands (see, *e.g.*, Affidavits

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<sup>9</sup> In the current session of the Legislature, hearings are being conducted by a joint legislative committee (Senator Seymour R. Thaler, Chairman) in an endeavor to find the answer to the continued high prices of alcoholic beverages in New York State since the 1964 liquor law became effective. The minutes of hearings already held are not yet available. As reported in the press the pricing practices of the industry starting with the distillers and down the line as described above and *infra*, pp. 54-57, are supported and documented by testimony that is being given at these hearings.

<sup>10</sup> An "oligopoly" is defined by economists as an industry in which a few sellers are dominant (*id.* p. 147).



of Lind, Street, and Hermann, listing brands of Seagram, Hiram Walker and National Distillers). Each brand is in a price class—(AA Prime, AA, A Prime, A, B, C). Each distiller—certainly the big four distillers—has a brand or brands within each class. (Moreland Commission Study Paper #5, p. 11.)

The brand class of a distiller's product, the retention of its prestige, is the supervening concern of the distiller. Brands are developed with the purpose of fitting into a certain class. The class is equated with the consumer price per bottle. The selling prices from distillery through wholesaler to retailer are arrived at on a mark-up scale for the brand intended as a "prime" or other class brand.

The industry considers its competitive weapon to be not price, but brand building and creating brand demand by brand advertising. The competition is not between distillers as such but between equivalent brand classes (*Industrial Pricing and Market Practices*, Alfred R. Oxenfeldt, "Whiskey Prices", p. 476; *The Whiskey Industry*, Harold L. Wattel<sup>11</sup> [1953 New School for Social Research doctoral thesis] Vol. II, p. 353).

From this concern in maintaining the prestige of its brands in its various brand classes the following truth concerning the industry has come about:

The distiller holds a firm grip on wholesaler to retailer prices. It does so through its methods of merchandising in the States where there are wholesalers, i.e., the "open" or "license" States.<sup>12</sup> Distillers sell in these States through

<sup>11</sup> Author of Study Paper No. 5 for the Moreland Commission, cited *supra*.

<sup>12</sup> The Monopoly States are considered in the next topic of this brief.

a limited number of wholesalers. The largest national distillers, such as Seagrams, have but 330 wholesalers (Lind Affidavit, R. p. 193); National Distillers have 230 (Hermann Affidavit, R. p. 225); Hiram Walker has 105 (Revit Affidavit, R. p. 205). In a State with as large a volume of liquor sales as New York (12% of the nation's total [Br., p. 14]), Brown Forman sells to but 9 wholesalers (Street Affidavit, R. p. 217).

The distillers know precisely the percentage of business each of their wholesalers does in their product (Lind Affidavit for Plaintiffs, R. pp. 193-4, itemizing the percentage of business in Seagram's brands done by each of its 330 wholesalers).<sup>13</sup>

Distillers usually restrict their wholesalers in that they may not sell other distillers' brands in the same price class. (*Industrial Pricing and Market Practices*, Alfred R. Oxenfeldt, "Whiskey Prices", p. 477; *The Distilled Spirits Industry: A Marketing Survey*, Borregard & Glusker, Yale Law School [1950], pp. 88, 91.) With exceptions, wholesalers will do the substantial part of their business in a particular brand or in the brands of one distiller, either by virtue of an exclusive franchise, by contract so specifying, or by the fact of having the distributorship in an area (see as to New York, *infra*, Point II, B).

Thus the merchandising practices and pricing by its wholesalers are guided by the distiller (Borregard & Glus-

<sup>13</sup> The affidavit recites (pp. 193-4):

- 16 of their wholesalers do 75% or more of their business in Seagram brands.
- 61 of their wholesalers do approximately 60-75% of their business in Seagram brands.
- 73 do 40-60% of their business in Seagram brands.
- 79 do 20-40% of their business in Seagram brands.
- 64 do 5-20% of their business in Seagram brands.
- 37 do 1-5% of their business in Seagram brands.

ker, *The Distilled Spirits Industry*, *supra*, pp. 92-93, 96, 99, 133-134; Oxenfeldt, *Industrial Pricing and Market Practices*, "Whiskey Prices", pp. 477, 483; Wattel, *The Whiskey Industry*, Vol. II, pp. 388, 434). Indeed, wholesale prices have, bluntly, been said to be "dictated" by the distiller (Borregard & Glusker, *The Distilled Spirits Industry*, p. 87), who sets the price structure at all levels of the industry (Wattel, *The Whiskey Industry*, Vol. II, p. 388).

The wholesaler's continuing in business depends on his having the brand products to sell. Departure from distiller "suggested" prices, from the mark-up spelled out to it by the distiller, means loss of the franchise or of the distribution of the distiller's brand or brands. Loss of one distiller's brand or brands for cause makes it unlikely that the wholesaler would get the distributorship of another major distillery. Distillers may be competitors, but the maverick wholesaler as to one distiller would be suspect by the others (*Studies, supra*).

The liquor wholesaler may be independent as a business entity (which appellants assert, Br. pp. 13-14, 62). But independent of the distiller whose brand is the mainstay of its business, it is not. Neither as to pricing nor as to merchandising practices.

While the wholesaler is therefore not independent on pricing, his consolation is large volume sales, because the number of wholesalers for a brand is few and the proportion of retailers to wholesalers is large.

As to control over merchandising practices, the distillers' is impressive. Structurally the big four distillers which set the pattern for the operations of the others, the distillers which operate nationwide and therefore would

have operations in other States to consider in making affirmations under § 9, are highly organized (Lind Deposition in *Laird v. Gage* [Kansas District Court, 1964<sup>14</sup>]): They have within themselves a federation, so to speak, of geographic regions: Eastern, Southern, Western, etc. Each is under the responsibility of a company vice president. Each region is then constituted of divisions which include several States. A company officer is in charge of each division. Each State in which the company operates is under the supervision of a company executive, and so on. They have field supervisors and representatives. The reporting is from the lowest unit at the bottom on up through State directors, division directors, regional directors, to the top (*e.g.* Hermann Affidavit, R. p. 226).

The companies necessarily have massive marketing staffs which fan across the country wherever their brands are sold. They have field representatives, known colloquially in the industry as "missionaries", who watch over the merchandising of their brands and their prices. (Lind Deposition in *Laird v. Gage*, *supra*; Oxenfeldt, *Industrial Pricing and Market Practices*, "Whiskey Prices", p. 477; Borregard & Glusker, *The Distilled Spirits Industry: A Marketing Survey*, P. 75.)

We have seen from Mr. Lind's affidavit that each and every one of Seagram's wholesalers was willing to disclose—if Seagram did not already know—precisely how much of the wholesaler's total business was in Seagram products. (That is, the total of the wholesaler's business, including that which he did in the products of other distillers.) When a distiller has been able to obtain this infor-

<sup>14</sup> This is the case involving the validity of a Kansas statute having the same purpose as the New York statute here involved, but totally different in provision, which was held unconstitutional (Br., p. 49. It is presently on appeal to the Supreme Court of Kansas).

mation even from wholesalers who do only 1%-5% of their business in the distiller's brand (*supra*, p. 28), would one not be obliged to eye quizzically and with considerable skepticism appellants' argument (Br. pp. 62-63) that even related wholesalers will not tell the brand owner what they charge for the brand owner's *own* product?

**Sale of Distilled Spirits to "Monopoly" or "Control" States.**

In addition to the sale of liquor by wholesalers in States commonly termed "open" or "license" States to whom distillers sell their brands, which has been discussed above, liquor is also sold in the United States by the States themselves. Such States are referred to as "monopoly" or "control" States.

There are 17 such States where liquor is sold by the State and not by private enterprise. In 16 of these it is sold by the State at wholesale and retail level for off-premises consumption; in the 17th (Wyoming) on the wholesale level only. In all 17 States thus the distiller sells to the State directly without intervening wholesaler.

In selling to all of these States the distiller must warrant that the distiller's price to the control State is no higher than the lowest price in any other State at the instant of sale (see Street Affidavit on behalf of Plaintiffs, R. p. 220). In at least some of these States, *e.g.*, Pennsylvania, such charge must reflect the cash or commodity allowances, post-offs or discounts offered purchasers in any other State (Phillips' Affidavit for Defendants, R. p. 313). Opinion of Court of Appeals, 16 N. Y. 2d at p. 57.

### Summary of Argument

Plaintiffs' arguments are built on a platform which they first construct, not of any actualities nor of the statutory provisions they are attacking, but of conjecture, of speculation, of *their* opinion—which they stoutly assert as fact—of what the statute does and is, or does not do or is not. For example, Point heading I (Br. p. 25): the statute “levies an economic burden on the operations of the distilled spirits industry in other States”. Or, another example (in connection with their supremacy argument): “even assuming the Act to be otherwise in furtherance of the State’s police power which is not the case here” (Br. p. 43). Their arguments of constitutional violations must needs fall resting as they do on such groundless assumptions.

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Appellants’ arguments of the effect of the statute upon their profits and of the problems of compliance—conjectural and speculative and demonstrated to be hollow by distribution and pricing practices of the Industry generally and in New York State—have no bearing on the constitutionality of the statute; would have no bearing even if compliance would confront appellants with great difficulty and expense.

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Section 9 is an internal regulation of the sale of liquor within the borders of the State and is, as is the State’s entire Alcoholic Beverage Control Law, and as are the liquor laws of all the States (including the “monopoly” or “control” States) constitutionally within the State’s power under the Twenty-first Amendment.

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Moreover this is an enactment under the Police Power. Control of maximum prices of commodities and services is a proper exercise of the Police Power.

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Were the subject of § 9 a product other than liquor (and thus the Twenty-first Amendment not determinative) and did the existence of the law have any repercussions in other States, this would not constitute interference with Interstate Commerce.

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The Sherman Act and Robinson-Patman Act are also irrelative to § 9. The remedial objectives of the former are totally different from the remedial objective of § 9 and there is no issue of conflict or harmony between the federal acts and § 9, and no issue of supremacy. This would be so were the subject of § 9 a product other than liquor and thus the Twenty-first amendment not determinative.

#### POINT I

Section 9 is an internal regulation of the sale of liquor within the borders of New York State by those licensed by the State to traffic in liquor within the State. It thus is an enactment constitutionally within the State's power under the Twenty-first Amendment of the United States Constitution, as is the State's entire Alcoholic Beverage Control law and as are the laws of all states controlling traffic in liquor therein.

Every State in the United States has its own statute in respect to the sale of liquor therein. Regulation in each State is according to its own lights of what is in the public



interest of its people. Some States, after Repeal, continued to prohibit the sale of liquor. At least one still does. Seventeen States have prohibited private enterprise engaging at all in the sale of liquor, making such sale a State function.<sup>15</sup> These are the "monopoly" or "control" States. Distillers and manufacturers sell to these States on State terms. In all of the other States the sale is by private enterprise under State license, on conditions required to be met to qualify for State license and to retain such license.

Regulation is detailed and affects all aspects of operation in the license States. An aspect of such regulation in many States affects pricing, minimum and maximum as well. A price warranty, with the same purpose as our §9, is a condition of distillers' selling to "monopoly" or "control" States (*supra*, p. 31).

Soon after Repeal various aspects of State regulation were challenged in the Courts. All were upheld by this Court. *Ziffrin, Inc. v. Reeves*, 308 U. S. 132, 138 (1939); *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395 (1939); *Mahoney v. Triner Corp.*, 304 U. S. 401 (1939); *State Board of Equalization v. Young's Market*, 299 U. S. 59; *Carter v. Virginia*, 321 U. S. 131 (1944).

An effort, some years after this group of cases, was made by the *State of California* to file a bill of complaint in this Court against the *State of Washington*, contending that Washington had erected trade barriers to sale of California wine within the State, thus violating the Commerce Clause, a violation which California contended was not sanctioned by the Twenty-first Amendment.

This Court's *Per Curiam* opinion in that case (358 U. S. 64 [1958]) disposed of the matter summarily, saying:

<sup>15</sup> One of these, Wyoming, licenses private retailers, *supra* p. 31.

"The motion for leave to file bill of complaint is denied. U. S. Const., Amend. XXI, § 2; *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *State Board of California v. Young's Market Co.*, 299 U. S. 59."

Just as does *California v. Washington* (*supra*), so do all of the above cited cases deny appellants' essential position that State liquor legislation must affirmatively promote temperance to come within the Twenty-first Amendment:

In *State Board v. Young Market Co.*, *supra*, the California statute which exacted a \$500. annual license fee for the privilege of importing beer from other States, obviously designed to protect local from foreign beer, was upheld.

In *Mahoney v. Joseph Triner Corp.*, *supra*, a Minnesota statute imposing requirements as to liquor imported from other States not imposed on liquor processed within the State, was sustained, the Court noting that the statute "clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere." (304 U. S. at 403.)

Held valid in *Indianapolis Brewing Co. v. Liquor Control Commission*, *supra*, and *Joseph S. Finch & Co. v. McKittrick*, *supra*, were retaliatory laws enacted by Michigan and Missouri respectively, which prohibited the importation or sale of beer manufactured in a State discriminating against beer produced in Michigan (*Indianapolis Brewing Co.* case) or Missouri (*Finch* case). In the *Indianapolis Brewing* case, the contention that the Michigan statute violated the due process clause was rejected. (305 U. S. at 304.)

In *Ziffirin, Inc. v. Reeves, supra*, a State statute confining the business of transporting liquor within the State to licensed common carriers was held valid against attacks of violation of the Commerce Clause, Due Process and Equal Protection.

In *Carter v. Virginia, supra*, the State statute upheld imposed rigid requirements upon those who transported through the State.

Patently the legislation upheld in these cases was not designed to promote temperance; there is no merit to appellants' argument that all liquor legislation must affirmatively promote temperance to be valid under the Twenty-first Amendment.

Appellants concede, as perforce they must (Br., p. 30), the above decisions of this Court which have held that the Twenty-first Amendment gives to the States total authority to regulate the sale of alcoholic beverages within their borders. Appellants seek to make capital (Br. pp. 31-34) of *United States v. Frankfort Distillers*, 324 U. S. 293 (1945), *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964) and *Department of Revenue v. James B. Beam Distillery Co.*, 377 U. S. 341 (1964).

These cases do not hold what appellants would wish they held. None diminishes the principle of *California v. Washington* and the decisions preceding it which this Court cites in that opinion.

The *Frankfort Distillers* case is one which it seems surprising that appellants should turn to. Defendants there, who included a number of the instant appellants (Footnote p. 293), were indicted for violation of § 1 of the Sherman Act. The United States Court of Appeals had reversed the District Court which had upheld the indictment. This

Court reversed the United States Court of Appeals and affirmed the District Court. The price-fixing conspiracy charged was interstate. Defendants there argued that the Twenty-first Amendment barred the prosecution. Mr. Justice BLACK, writing this Court's Opinion, said, without equivocation (p. 299):

"That Amendment [21st] bestowed upon the states broad regulatory power over the liquor traffic within their territories [citing *Carter, Ziffirin* and *State Board v. Young's Market*, *supra*]."

The Opinion upheld the power of the United States to prosecute because (p. 299):

*"The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado. Those combinations which the Sherman Act makes illegal as to producers, wholesalers and retailers are expressly exempted from the scope of the Fair Trade Act of Colorado, and thus have no legal sanction under state law either. We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the State. \* \* \*"* (Italics ours.)

Thus the premise on which the decision was based was that it was the States which have control over sales of liquor and the issue was, did this particular State law foreclose Sherman Act prosecution, not vice versa.

Mr. Justice FRANKFURTER wrote a concurring opinion, which added to what Mr. Justice BLACK's majority opinion had said (pp. 300-302):

"The Twenty-first Amendment \* \* \* [subordinated] rights under the Commerce Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders. \* \* \*

"As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating

liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. \* \* \*

"Thus the question in this case, as I see it, is whether in fact the policy of Colorado sanctions such an arrangement as the indictment charges. Such a policy may be expressed either formally by legislation or by implied permission. \* \* \* In the view I take of the matter, *if a State authorized the transactions here complained of, the Sherman Law could not override such exercise of state power.* For, in any event, *if state policy did so authorize it, conformity with the state policy could not be deemed an 'unreasonable' restraint of interstate commerce.* But I do not find that Colorado has done so." (Italics ours.)

No more does *Hostetter v. Idlewild Bon Voyage Co.* support appellants. There the matter involved was wholly and purely an export operation at Idlewild International Airport (377 U. S. at pp. 325-6), so held by the United States Acting Commissioner of Customs.

This Court—Mr. Justice BLACK<sup>16</sup> dissenting in an opinion in which Mr. Justice GOLDBERG concurred (pp. 334-340)—held that this strictly foreign commerce operation did

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<sup>16</sup> Mr. Justice BLACK wrote the prevailing opinion in *United States v. Frankfort Distillers, supra*.

not require a license under the New York Alcoholic Beverage Control Law.

Mr. Justice STEWART's prevailing opinion first said (p. 330):

"This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. \* \* \*

"This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders *has remained unquestioned*. See *California v. Washington*, 358 U. S. 64. \* \* \*"  
(Italics ours.)

The Opinion cited and discussed for this unequivocal affirmation of the State's "unquestioned" power over the traffic and distribution of intoxicants within its borders the cases we have cited *supra*. It made utterly clear what it meant by federal power over foreign commerce in liquor by explaining (pp. 333, 334):

"Here, ultimate delivery and use is not in New York, but in a foreign country. The state has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. As the District Court emphasized, this case does not involve 'measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York.' 212 F. Supp., at 386."

In *Department of Revenue v. Beam Distilling Co.*, *supra*, the third case upon which appellants rely, the Supreme Court had before it the question of a State tax on imported whiskey while it was in unbroken package prior to re-

sale or use by the importer. This Court held that this violated the Export-Import Clause of the Constitution.

The Opinion by Mr. Justice STEWART, so as to leave no doubt took pains to affirm once more the States' total authority over the distribution of liquor within their borders (p. 346).

"We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. *There can surely be no doubt, either of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use or consumption of intoxicants within her territory after they have been imported*" (Italics ours).

None of these three cases can lend any comfort to appellants' cause.<sup>17</sup> They all reiterate and reaffirm the States' authority to regulate sale of liquor within its borders, which makes valid a State enactment such as § 9.

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<sup>17</sup> Discussion of these cases in the New York Court's Opinions in the instant case; 16 N. Y. 2d, p. 58; 23 N. Y. A. D. 2d, p. 934.



## POINT II

Control of maximum prices is a proper exercise of the police power. Section 9 thus being an enactment under the police power, the Legislature had the greatest leeway in determining the measure and method of effectuating its police power purpose for the protection of the People of the State from economic disadvantaging at the hands of an industry.

A State is not required to gear its police power measures to the merchandising maneuvers in which the industry affected engages for its profit. It is on such that appellants base their contentions of difficulty of compliance and their due process argument. Moreover their contentions are sheerly conjectural and speculative and are in fact contradicted by the pricing operations which obtain in the industry in and outside New York State.

The merchandising practices of the industry in New York State self-evidently support the need for Section 9 and its application to those whom it covers.

### A. Control of maximum prices is a proper exercise of the police power.

Statutory regulation of pricing by private industry which by various formulae places a maximum on prices, is an approved exercise of the State Police Power. This Court has upheld such State statutory regulations on a variety of products and services far removed from the necessities of life. For example:

*Gold et al. v. DiCarlo et al.*, 380 U. S. 530 (1965) aff'g 235 F. Supp. 817, 820-1 (Three-Judge District Court, S. D. N. Y.) upheld the New York statutory provision (General Business Law § 169-c) fixing the limit which a theatre ticket broker may charge for theatre tickets above the price

printed on the ticket (The law makes violation a misdemeanor).

*Olsen v. Nebraska*, 313 U. S. 236 (1941) upheld a State statute fixing fees of private employment agencies;

*Townsend v. Yeomans*, 301 U. S. 441 (1937) upheld a State statute fixing maximum charges for handling and selling leaf tobacco;

*Nebbia v. New York*, *supra*, 262 N. Y. 259, aff'd 291 U. S. 502 (1934) upheld the New York statute authorizing the fixing of a maximum as well as a minimum price of milk;

*O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251 (1931) upheld a State statute limiting commissions of agents of fire insurance companies.

The criterion of long ago which required a business to be "affected with a public interest" before its pricing could be the subject of regulation by State statute was discarded 30 years ago (*Nebbia v. New York*, *supra*, 291 U. S. at pp. 531-539), whatever it once was deemed to mean more than that "an industry" "is subject to control for the public good" (*id.* p. 536).

Appellants (Br., p. 54) agree that State legislation fixing "maximum price limitations" is upheld "because of industry abuses which can only be corrected by this device". They cite *Gold et al. v. DiCarlo*, 380 U. S. 520, *supra*, the theatre ticket case, as an example. If ever there were inundating evidence "of industry abuses" which called for maximum price legislation, the liquor industry pricing in New York State is it (*supra*, pp. 14-18, 28-31; *infra*, pp. 54-57).

Controlling maximum prices where necessary for the protection of the public is the public policy in New York

State (*e.g.*, General Business Law §§ 185, 169-c; Insurance Law §§ 180, 184-c, 186, 255[2]) and New York is not isolated in following such policy. It is at one with the police power, state and federal, to protect the consumer from being the victim of the vendors of the products it buys, be they necessities, comforts or even luxuries. *Cf. Head v. New Mexico Board*, 374 U. S. 424 [1963], *infra*. Government's effectuation of this policy is accomplished in a variety of ways, maximum mark-ups, approved prices, and so on.

In fact, by § 9 New York has not imposed upon appellants a maximum selling price or a maximum mark-up or a maximum profit as do some State liquor laws. South Carolina imposes on liquor wholesalers and retailers a maximum percentage mark-up over cost (South Carolina Code, Vol. I, p. 312, §§ 4-72). Minnesota permits the regulatory body to fix the maximum wholesale liquor prices (Minnesota Statutes § 340.09). New Mexico prohibits fair trade contracts in the sale of liquor which give wholesalers more than a specified percentage profit (New Mexico Statutes §§ 46-9-5, 46-5-6). Section 9 on the other hand left the liquor industry complete freedom in pricing in New York, with one restriction: that they charge in New York no more than the price for which they—seemingly—can profitably sell their products elsewhere. They are free to charge more elsewhere or less in New York. They are *not* required to *match* in New York their price elsewhere.

The statutory provision attacked here is one regulatory provision over an industry historically regulated; currently regulated in every State of the United States. "The regulation of the liquor traffic is one of the oldest and most untrammelled of legislative powers" (*Goesaert v. Cleary*, 335 U. S. 464, 465 [1948]).

Indeed, the business has, in the 17 "monopoly" States, been taken from the hands of private industry and made a function of the State.

Private liquor wholesalers—one group of appellants in the instant action—are non-existent in those States. Distillers—one group of appellants in the instant action—do business in those States with the State government on State terms. These terms include a provision such as that of § 9. (In the "monopoly" States the warranty does not cover wholesalers—because there are no wholesalers.) If it were beyond the power of New York to make this a regulatory requirement by statute, it would be beyond the power of the "monopoly" States to exact it by contract. If it is possible for appellants to comply with such a requirement because they choose to do so by contract, it is possible for them to comply with it under our statute. Obviously appellants accept the "monopoly" States' conditions in order to sell to them.

But the constitutionality of our statute is not to be determined by appellants' willingness to comply in the monopoly States because they deem they have no alternative, but conjuring up arguments in opposition because in New York they have a sellers' market with not one but a multitude of customers.

In *California Auto Association v. Maloney*, 341 U. S. 105, 110, this Court (by Mr. Justice DOUGLAS) said:

"Here \* \* \* the power of the state is broad enough to take over the whole business, leaving no part for private enterprise. *Mountain Timber Co. v. Washington*, 243 U. S. 219; *Osborn v. Ozlin*, *supra*, [310 U. S. 53] p. 66. The state may therefore hold its hand on condition that local needs be serviced by the business."

Or to apply this principle to the instant situation "on condition" that the people of the State be not prejudiced economically by the pricing practices of this business.

Appellants, with fine disregard for their contradictory position that Section 9 would cause them infinite economic harm by curtailing their sales in New York, insist on their opinion that § 9 would not promote temperance and that this is the whole purpose of liquor sale regulation especially of the New York ABC Law. This is answered not only by the fact that it was found in 1964 that high prices have not in fact promoted temperance (*supra*); not only by the fact that appellants' views as to whether § 9 will or will not effect temperance are irrelevant; not only by the other purpose of the New York Beverage Law § 2 (the "protection" and "welfare" of the people of the State), but by the fact that authority for an exercise of the police power need not be found in the purpose provision of the comprehensive regulatory statute governing an industry; that the Legislature had authority to adopt this enactment under its "inherent" police power.

The police power encompasses all facets of community needs and is not limited, as appellants would suggest, to the protection of the physical welfare of the public. It encompasses protection of the people from "economic menace" to the general welfare, from economic disadvantaging at the hands of business (*Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 427 [1937]; *Beauharnais v. Illinois*, 343 U. S. 256, 262 [1952], and see *infra*). It is a flexible power, adaptable to and extended with developing concepts of the areas of government's duty to the people and of areas of need for government intervention on behalf of the people. "Notions of public policy" which once obtained as to what interests of the people government may protect, are not to be given "continuing vitality as

standards by which the constitutionality of the economic" statutes "of the states is to be determined" (*Olsen v. Nebraska*, 313 U. S. 236, 247 [1941]; *Ferguson v. Skrupa*, 372 U. S., *infra*, 726 [1963].) *Supra* this subpoint specifically as to maximum price control.

Appellants are strong in their opinion (Br. p. 66) that Section 9 will not serve to remedy evil it was designed to remedy. (They describe it as "purported" evil.) Whether it will or not accomplish its purpose, this Court has said, is not for the judiciary, nor for those challenging a law, but for the Legislature.

"Choice of policy," "trial-and-error" is left to the Legislature in fulfilling its responsibility (*Beauharnais v. Illinois*, 343 U. S. 250, 262 [1952]).

The doctrine is, as expressed by Mr. Justice BLACK writing for this Court in *Ferguson v. Skrupa*, 372 U. S. 726 (1963) (at pp. 730-1):

"courts do not substitute their \* \* \* economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned \* \* \* with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.' [quoting from *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 536 (1949).]"

As this Court said in *California Auto Assn. v. Maloney*, 341 U. S. 105, 110 (1951):

"Whether \* \* \* [a state's] program is wise or unwise is not \* \* \* [a judicial concern]. See *Olsen v. Nebraska*, 313 U. S. 236; *Lincoln Union v. Northwestern Co.*, 335 U. S. 525. The problem is a local one \* \* \*."

See also *Sproles v. Binford*, 286 U. S. 374, 388.

Appellants declare that the law is unreasonable; that wholesalers are under no "legal obligation" to give information to distillers as to their prices or the quantity of business that they do in a particular distillers' brand (Br. p. 62). Perhaps the practicalities are more effective than a "legal obligation", for we see (*supra*; *infra*), somehow the distillers do know both their wholesalers' prices and the quantity of the distillers' product the wholesalers sell.

Appellants to illustrate their argument that Section 9 is unreasonable, take the strange method of imagining possible devious utilization of it to depress prices in New York.

They evoke (Br., pp. 63-4, 65) a "blackmailing" wholesaler, a "reprehensible", "vindictive" wholesaler in "Chicago", with extortionist hands around the throat of a giant distiller breaking its prices in New York and destroying its New York wholesalers. This can hardly be taken seriously. We venture to say that appellants have never encountered such a one and do not expect to. ("Characteristics of the Industry" *supra*.)

They also pose a possible scheme by a "collusive" distiller (Br., p. 65). This "collusive" distiller could, they can see, conspire with an out-of-State wholesaler (Br., p. 65) to

"sell the brands of the distiller's competitor at prices so low as to prevent the competitor from being able to market his brands in New York. The collusive distiller would then enjoy a marked competitive advantage in New York for the period his competitor was



faced with the dilemma of selling at a severe loss in New York or not selling at all and risking the loss of his New York market. That such a fantastic spectacle is without the bounds of reason can hardly be questioned."

To this we might say that any distiller bent upon entering into a collusive agreement with a wholesaler to depress the price of a competitor's brand in New York State did not have to wait for Section 9 for help. He could if so inclined conspire with a wholesaler or wholesalers right in New York State today though the operation of § 9 is stayed.

We would also suggest that if distillers have the kind of control over wholesalers that their imagined situation describes, they can have no trouble in obtaining related wholesalers' prices of the distillers' own brands.

Above all the possibility of the kind of utilization of the statute for devious purposes which appellants envision—and there is little that is immune from unethical misuse—does not assuredly render a statute unconstitutional as "unreasonable" or on any other ground.

An enlightened exercise of the police power to protect the consumers of the product of a powerful industry which practices an old time control over the pricing of its product from manufacturer to consumer produced this statute. As Mr. Justice DOUGLAS wrote in *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488 (1955):

"The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia v. New York*, 291 U. S. 502; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Olsen v. Nebraska*, 313 U. S. 236; *Lincoln Union v. Northwestern Co.*, 336 U. S. 525; *Daniel v. Family Ins. Co.*,

336 U. S. 220; *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421.”

In *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 423 (1952), Mr. Justice DOUGLAS had said:

“the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare \* \* \*”

**B. That a statutory enactment for the benefit of the People may have a burdensome impact or be a financial detriment to the industry it affects does not render it unconstitutional.**

Appellants argue that there would be difficulties in complying with the statute and adverse financial effects.

First, of course, an exercise of the police power for the benefit of all the people overbalances and is not rendered invalid because its effect would be to cause expenses or be financially detrimental to those whom it restrains. (*California Auto Assn. v. Maloney*, 341 U. S. 105, 111 [1951]; *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 424 [1952]; *Standard Oil Co. v. Marysville*, 279 U. S. 582, 586; *Fox v. Standard Oil Co.*, 294 U. S. 87, 102; *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 170, *Sproles v. Binford*, 286 U. S. 321, 388-389). Moreover, the difficulties appellants envision are created of conjecture and speculation. This is obviously so because their litigation has prevented the statute from ever going into effect. The picture they draw of problems they would encounter in compliance at times borders on the fanciful and at times goes into the dramatic, as we have seen (*supra*, p. 47).

In any case on the most serious speculation and conjecture of their burdensome results, laws are not held unconstitutional. Courts do not join in such speculation “upon the nature or extent of the burden” and “make pro-

nouncement" thereon. (*Federation of Labor v. McAdory*, 325 U. S. 450, 469 [1945].)

Moreover, appellants' arguments of difficulty in complying are entirely arguments of the effect on their profits. This is the thesis which crops up on page after page of appellants' brief. All of their arguments are based on their present merchandising methods and techniques to stimulate their sales.

As this Court said in *California Auto Association v. Maloney*, 341 U. S. 105, 111, *supra*:

"Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dignity of a taking in the constitutional sense."

Our statute is under New York's police power for the benefit of all the People. New York is not required to gear such law to appellants' profit motive and merchandising techniques born of that. (*Fox v. Standard Oil Co.*, 294 U. S. 87, 102 [1935]; *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 170 [1934]; *Sproles v. Binford*, 286 U. S. 374, 389 [1932].)

Appellants seemingly are concerned that upholding this law would be an invitation to legislation in other States inimical to their interests. If that would transpire, so be it. Before this Court is the issue of the validity of *this* law.

Appellants' conjecture and speculation of difficulties in complying are contradicted by the realities ("Characteristics of the Industry", *supra*).

We comment first on appellants' protests of such difficulties in respect to the distillers' own prices to wholesalers, curious as such argument is.

Promotional devices to which they resort in other States to stimulate sales appellants argue would confront them with difficulties in complying with § 9 since under the section New York prices would be required to be no higher than the lowest price outside the State though that price is not a flat simple price, but is reached by incentive programs to spur the wholesaler or retailer to push up the sales of the distiller's brand.

It is to be remembered that as to prices in the 17 Monopoly States, there would be no problem at all. There is a unit within the larger distiller companies devoted exclusively to Monopoly State sales which has the information as to selling prices to those States at its fingertips. In some of these States, for example, Pennsylvania (Phillips' Affidavit for Defendants, R. 313), distillers are required to have their prices reflect promotional allowances in other States.

If the distillers can have or obtain such information for any State, they can do so for New York. In the Monopoly States the problem would appear to be more difficult than in New York, since in those States the warranty must be of no higher prices than the lowest price in other States *at the time of sale* to the Monopoly State. In New York it would be as to the prices in other States in a preceding month. Seemingly distillers solve the problem for the Monopoly States, whether by allowing a round figure in the Monopoly State prices to take care of discounts, allowances, etc. in other States, or otherwise. They solve it.

Finally, essentially the distillers know the lowest price for which they sell their brands. Their promotional techniques may be to charge that lowest price, now here, now there, to increase sales at one place or another, but the lowest price for which they will sell a brand they know

(Street deposition in *Laird v. Gage*, *supra*; testimony of Robert W. Coyne, President, Distillers Spirits Institute, before joint legislative committee for study of alcoholic beverage control [Ex. C to plaintiff's order to show cause] R. pp. 49-50). This is all they need to know for Section 9.

We come then to the prices to retailers by related wholesalers.

All that has been said as to determining distillers' prices<sup>18</sup> outside New York State obtains as to wholesalers' prices. On the matter of knowledge by the brand owner of wholesale prices of its brands throughout the country, this is, as we have seen, an Industry marked by unique discipline. We have seen *supra* (Lind Affidavit for Plaintiffs, R. 59-60) how very much in minute detail the distillers know about the business of their distributor. The brand owners, thus, are fully aware of how their brands are faring<sup>19</sup> and how they are being handled by the limited number of related wholesalers to whom their brands are entrusted.

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<sup>18</sup> They must have their prices all over the United States months in advance of the prices being in effect. The existence of so many State price posting or filing requirements makes it essential that there be precision in projecting prices in advance—a month, two months or three months in advance. Because there are among these States minimum price requirements, minimum mark up requirements, maximum price requirements, there must be exactitude in projection of prices.

<sup>19</sup> This computerized age will ease any problems. Business Week for September 25, 1965 in its section "Marketing Briefs" has an item entitled "Schenley gets instant market information from computerized video data system." The article starts with the following: "By punching some buttons and looking at a desk-top video screen, executives of Schenley Industries now can tell 'instantaneously' how their company's wines and spirits are selling all over the country."

It goes on: "The 3½-in. by 4½-in. screens can flash combinations of up to 3-million bits of information stored in the computer,

(Footnote continued on following page)

We have seen *supra* ("Characteristics of the Industry") that generally wholesale prices apparently are at least suggested by the distillers. It therefore would seem that they know the wholesale prices of their brands everywhere without inquiring. For that reason, and because it strains credulity to accept that the wholesaler who has an exclusive franchise in a brand or who does the substantial portion of his business in a distiller's products, will risk the chief bulwark of its business by defying an inquiry as to prices from the distiller, the distiller knows the running prices of its brands at all times.<sup>20</sup> And see *infra* as to the solution of the occasional particular problem in making an affirmation.

We are reminded again that § 9 does not require matching prices with other States; it does not ask that the prices in other States be stated. It merely asks that New York prices be *no higher*.

Not only is it known to all who are acquainted with the Industry that the brand owners know in advance the whole-

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(Footnote continued from preceding page)

showing how a brand is doing in any or all sizes in any market, city, state, or national; at any or all of the over 400 distributors; sales for each month or the year to date, compared to earlier periods; prices and, eventually perhaps, figures on competing brands.

"Information also is beamed over two larger, 23-in. monitors for group viewing, and is printed in more conventional 'hard' form by teletype machines. Data on prices and orders are fed in daily, and on sales and inventories monthly. \* \* \* the system will save 2½-min. to 35-min. on simple tasks, and up to three or four hours on complicated ones." That is it will make even more instantly available information already constantly available.

<sup>20</sup> Appellants also speak of the related person wholesaler in New York being bound by the related person wholesalers' prices in another State. They are, as we saw above, generally bound by distiller suggested prices, so that as a practical matter nothing is changed. These wholesale prices tend to be uniform throughout a State irrespective of wholesalers' costs of operations as between metropolitan areas and smaller communities. See *infra*.

sale prices of their products and have a role in determining these prices, but were this not known, it would be a rational inference from the minimum consumer resale price provisions in the statutes of many States. In some States there are also minimum wholesale price provisions (Moreland Commission Report #3, Appendices A and B, pp. 32-34).

For the latter States, wholesale prices unquestionably are known.

Reasoning from the retail prices which are fixed mainly by the distiller under the statutes, and in "Fair Trade" contracts by distillers as in New York in this last year (*supra* p. 21), necessarily they are fixed with the retailer's mark up a consideration. For that mark up, the wholesaler's price must be the base. Thus the distiller's voice is heard in respect to the wholesale price; the wholesale price is known to the distiller.

#### **The Marketing and Pricing Situation in New York**

The present marketing and pricing situation in New York is eloquent of the knowledge distillers have to enable them to comply with § 9, as to wholesalers' prices and by the same token of the practices which indicated the need for the provision in section 9 covering related wholesalers as well as brand owners prices.

What we note here is found in New York price schedules filed with the State Liquor Authority and in trade publications in this and other States.

#### ***Restricted wholesaling***

In New York State, as elsewhere except in the rare State where this may be forbidden ("Characteristics of the In-



dustry", *supra*), distillers typically restrict the wholesalers through whom they sell their products. Some wholesalers have the distribution of all of a distiller's brands, some of only a single brand or a few brands. Distillers include the names of their restricted wholesalers with the brands they are authorized to distribute as part of their price schedules filed with the New York State Liquor Authority.

The same wholesaler, with few exceptions, is not given distribution by the giant distiller of their brand of the same class—price class—if it handles the same price class brand of another of the giant distillers.

This merchandising practice is of course not required by New York law. It is the distillers' own merchandising practice and one which seemingly by common consensus the major distillers follow.

#### *Wholesale prices.*

In New York the statutory provisions in respect to liquor prices prior to the 1964 statute were that (a) minimum consumer resale prices were fixed by the distiller (Alcoholic Beverage Control Law § 101-c<sup>21</sup>); (b) a distiller could not discriminate in prices as between the wholesalers to whom the distiller sold, nor could a wholesaler discriminate in prices as between the retailers to whom the wholesaler sold (§ 101-b [2, a]).

<sup>21</sup> It is not at all contradictory as appellants suggest (Br. pp. 28, 49), that § 9 was enacted while the Legislature continued to allow Feld-Crawford to cover liquor retail sales when the state enforced minimum consumer resale price provision was repealed. On the contrary, the Legislature realizing that there could be agreements under the comprehensive Feld-Crawford Act, enacted § 9 with the purpose that Feld-Crawford agreements would be at lower prices to consumers if retailers and wholesalers were paying lower prices for liquor to their suppliers than they had been in the past.

But there was nothing in the law which directed or in any way inhibited the freedom of each wholesaler in its prices to retailers—just so its price to retailers was the same for all to whom it sold.

Apparently, however, somewhere there has been influence on the wholesalers' prices to retailers. Because in any given month wholesalers in New York City—and in the State—typically charge the same price to the penny for the same brand.<sup>22</sup> The wholesale schedules of prices filed with the State Liquor Authority reflect this—month after month, year after year.

We look at some filed price schedules and price advertising of the products of some of the plaintiffs in this action, Seagram, Hiram-Walker, National Distillers. We take some of Seagram's products, for example. Seagram's Vice-President and General Counsel, Mr. Frederic J. Lind, submitted the lead affidavit on behalf of the appellants in the instant case on inability to comply. The advertised wholesale price of their well known brands, 7 Crown, Four Roses, Seagram's V. O., Wilson's That's All, by every wholesaler in New York City and the wholesale price in their monthly filed price schedules all over the state including upstate New York in December 1964, in every month of 1965 and right through January 1966 has been exactly the same. (All this after Section 101-c,

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<sup>22</sup> Appellants profess concern for New York State wholesalers whose operating costs—they say—may be higher than in another state. This is another of their specious arguments. Because for one thing the sales volume being larger in New York total income is larger. Secondly operating costs are necessarily higher in some areas of New York State than in others, as they are in different parts of all states. But somehow wholesale prices tend to be similar in all parts of a given state. Finally, the prices wholesalers pay for their products would be lower by reason of § 9.

the minimum consumer price provision was no longer in effect.) The advertised wholesale price<sup>23</sup> and the filed monthly wholesale prices for Hiram Walker products (Canadian Club and Imperial) was exactly the same in December 1964, in every month of 1965 and in January 1966 by its subsidiary in New York City through whom it distributes to retailers in New York City and also by its wholesalers upstate. The same is true of National Distillers (affidavit of Mr. R. R. Hermann, Jr. in this action). It is interesting that National Distillers wholesaler in Buffalo and Rochester which adhered to the same wholesale price is McKesson & Robbins. This sheds interesting light on their affidavit in this case (R. 199).

In fact Beverage Media (and other journals of this type) carry a Price and Brand Index with the wholesale price of each brand. The wholesale prices for the brand advertised by each wholesaler tends not to deviate from the prices listed in this Index.

Patently, the free enterprise for which appellants argue so vehemently in their brief has not in this Industry operated in New York State. To sum up:

- 1) the minimum consumer resale prices permissible and enforced under § 101-c remained at such high level—among the highest in the nation;
- 2) the wholesaler to retailer prices of all wholesalers for the same brand within a geographic area of the State and even generally throughout the State, have tended to be uniform—and high.

The need for § 9 is self-evident.

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<sup>23</sup> *Beverage Media, Metropolitan Edition.*

**C. As to appellants' "vagueness" argument.**

Appellants conjure up a variety of professed worries on the subject of what would be regarded as a "related wholesaler"; as to what is meant by the word "substantial" in the definition of related person. This is their argument that the statute is "intolerably vague" (Br., p. 66).

As appellants themselves recognize (Br. p. 38), the federal antitrust acts use the phrase "to substantially lessen" competition. Yet these acts have never been held unconstitutional because the phrase is not defined. The rule of reason in the context of the acts and their purpose has obtained in finding what conduct came within the law and what did not. The Robinson-Patman Act also declares it unlawful to discriminate in price where the effect of such discrimination may be "substantially to lessen" competition. That act too has not been held unconstitutional because the phrase has not been defined. Again the rule of reason has been used in applying it.

As the New York Supreme Court (45 Misc. 2d at p. 956) said in respect to the "vagueness" argument, legislation is and often must be enacted in broad outline leaving to administrative officials the duty of determining "facts and conditions" upon which the operation of a statute depends.

In *Board of Governors v. Agnew*, 329 U. S. 441 (1947), the meaning of the phrase "primarily involved" was at issue and the question became whether if "primarily" connotes "substantiality", the statutory provision involved was sufficient.

This Court said:

"But we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable

so as to survive challenge on the grounds of unconstitutionality. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 397-400; *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 142-146; *Yakus v. United States*, 321 U. S. 414, 424-428; *Bowles v. Willingham*, 321 U. S. 503, 512-516." (329 U. S. at p. 449.)

See also, e.g., *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24 where the phrase "public interest" was held an adequate standard; and *National Broadcasting Corp. v. United States*, 319 U. S. 190, 225-226 (1943); *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 285 ("public convenience, interest or necessity"); and see *Sproles v. Binford*, 286 U. S. 374, 393.

Be it remembered that the federal anti-trust acts all contain criminal penalties. Appellants here express trepidation about innocent failure to have all information or accurate information in making the affirmations since a false affirmation is declared by the statute to be a misdemeanor. Of course only if it is proven that an affirmation were made with knowledge that a statement therein is false would it constitute a misdemeanor. The statute is to be construed as so requiring (*Morissette v. United States*, 342 U. S. 246, 250 *et seq.*).

Section 9 seeks the lower price in New York—not to prosecute the industry. It of course would only be a course of conduct, indicating knowingly making false affirmations that would induce the State Liquor Authority to initiate a prosecution. The State Liquor Authority knows and plaintiffs know that falsification in the affirmations with knowledge that the statements made are untrue, would have to be proven beyond a reasonable doubt for prosecution.

"That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold

the language [of a statute] too ambiguous to define a criminal offense." (*U. S. v. Petrillo*, 332 U. S. 1, 7).

"Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within the language." *U. S. v. National Dairy Corp.*, 372 U. S. 29, 32 (1963).

See also, *U. S. v. Wurzbach*, 280 U. S. 396, 399.

**D. The equal protection argument is without basis because there is readily discernible reason for the scope of coverage of § 9.**

All that need be said in answer to appellants' argument (Br. Point V) of denial of equal protection in that neither non-related persons, private brands or wine are covered by § 9, is that it is easy to see why they were not.

"Private brands" have always been excluded from provisions of the Alcoholic Beverage Control Law which apply to "brand" liquors (§ 101-b, former ¶ "e" of subd. 3).

Wine has always been dealt with specially in the Alcoholic Beverage Control Law (Article 6 "Special Provisions Relating to Wine").

The source of control over liquor prices was found to be the distillers (*supra*, pp. 24-31). Control over pricing by wholesalers not related to the distiller would not be the same as over related wholesalers. Therefore, non-related wholesalers are not included in § 9.

To exclude all of these is therefore constitutionally permissible classification.

"Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment."

*Norvell v. Illinois*, 373 U. S. 420, 423 (1963).

"The Constitution does not require things which are different in fact *or opinion* to be treated in law as though they were the same." (Italics ours.)

*Tigner v. Texas*, 310 U. S. 141, 147 (1940).

That others who might have been included in a statute were not, does not render a statute unconstitutional.

*United States v. Carolene Products Co.*, 304 U. S. 144, 151;

*Williamson v. Lee Optical*, 348 U. S. 483, 489 (1955).

### POINT III

**Were the subject of Section 9 a product other than liquor (and thus the Twenty-first Amendment not determinative), Section 9 does not interfere with interstate commerce; the Sherman Act and Robinson-Patman Act are irrelative to Section 9 and appellants' supremacy clause argument accordingly fails.**

Even if this were not State regulation of the sale of liquor, the statute is not in violation of the Commerce Clause, or of the Sherman Act or of the Robinson-Patman Act.

Contrary to the impression appellants' argument seeks to create, the Commerce Clause does not render invalid State laws whose mere existence might have a remote influence in other States.

If that were not so, much legislation in more enlightened States affecting industries which operate nationally would be unconstitutional simply because of what other States might do or not do or permit or not permit. This is



appellants' argument of the influence § 9<sup>24</sup> may have in other States.

(A)

**As to Appellants' Interstate Commerce Argument.**

The Interstate Commerce Clause does not have any such reach as appellants would give it.

As Mr. Justice FRANKFURTER said in *Osborn v. Ozlin*, 310 U. S. 53, 62 (1940):

"\* \* \* the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. *The mere fact that state action may have repercussions beyond state lines* is of no judicial significance so long as the action is not within that domain which the Constitution forbids." (Emphasis supplied.)

In another opinion *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940) upholding a Wisconsin tax, Justice FRANKFURTER wrote (pp. 444-445):

"The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has *conditioned* the demand of the exaction upon *happenings outside its own borders*." (Italics ours.)

The State police power is if anything greater than State taxing power.

Among the host of opinions to the same effect as *Osborn v. Ozlin* and *Wisconsin v. J. C. Penney Co.*, see *Hoopeston v. Cullen*, 318 U. S. 313, 320-321 (Mr. Justice BLACK, 1943);

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<sup>24</sup> Plaintiffs' argument (Br. Point VI) concerning subdivision 3(a) of § 7 we have dealt with *supra*, pp. 3-4, 23-24.

*Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 426-427 (1937). The "repercussions" of one State's laws upon the activities of a business which operates nationwide is "a consequence of modern practice of conducting wide spread business activities throughout the United States" (*Watson v. Employers Liability Corp.*, 348 U. S. 66, 72, 73 [Mr. Justice BLACK, 1954]). Each State in which such businesses operate may without violating the Interstate Commerce Clause adopt laws affecting them on matters of local concern even where in doing so interstate commerce is in some measure affected.

"There is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even to some extent, regulate it [citing cases] \* \* \* *when the regulation of matters of local concern is local in character and effect, and its impact on national commerce does not seriously interfere with its operation, \* \* \* such regulation has generally been held to be within state authority* [citing cases]."

(*Southern Pacific Co. v. Arizona*, 325 U. S. 761, 767 [1945]; emphasis supplied.)

"Legislation in a great variety of ways may affect commerce \* \* \* without constituting a regulation of it within the meaning of the constitution."

(*Huron Cement Co. v. Detroit*, 362 U. S. 440, 444 [1960].)

The Court in the *Huron* case cited the "teaching" of the Supreme Court's decisions to which appellants in this case do violence in their arguments of constitutional invalidity (Br. Points II, III, IV):

The "*teaching of this Court's decisions*", said Mr. Justice STEWART, "*enjoin seeking out conflicts between state*

and federal regulation where none clearly exists" (*id.* 362 U. S. at p. 446).

The argument appellants make here as to problems they would have if other States were to enact similar or conflicting statutes, was likewise made in the *Huron* case. The Court there simply noted that appellants had pointed to no "competing or conflicting" regulations (*id.* p. 448). It would not, however, have been an effective argument had there been such showing (*Watson v. Employers Liability Corp.*, 348 U. S. 66, 72 [1954]).

Even in the field of operation of a radio station, which is under the regulatory jurisdiction of a federal agency, the Federal Communications Commission, this Court unanimously held (Mr. Justice STEWART writing the opinion for the Court, Mr. Justice DOUGLAS concurring in the result and Mr. Justice BRENNAN writing a concurring opinion), in *Head v. New Mexico Board*, 374 U. S. 424, 1963 that a State statute could restrict certain occupations from advertising and thus restrict the radio station from accepting and broadcasting such advertisement.

"Without doubt the appellants' radio station and newspaper are engaged in interstate commerce", said the Court (p. 427).

"Unquestionably" enjoining this advertising "imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce" (pp. 427-8).

"A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way" (p. 429).

The Court added that it could not find

"that the legislation impinges upon an area of interstate commerce which by its nature requires uniformity of regulation" (p. 429).

The same is true of the instant case. Undoubtedly, the radio station in the *Head* case could accept in other states the advertising which the State statute involved in the action (New Mexico) restricted, and indeed could undoubtedly broadcast the same advertisement in another state within its broadcast range which it could not accept in New Mexico. Moreover, the radio station was licensed by a Federal agency which had detailed jurisdiction over it including the content of radio advertising (374 U. S. 436, 437). Another Federal agency, the Federal Trade Commission, has jurisdiction over false, misleading or deceptive advertising designed for radio broadcast, 374 U. S. at p. 441.

Nevertheless, this Court held that all this did not displace State regulation (374 at p. 442). The subject matter, held this Court, was not one admitting "only of national supervision."

The State statute in the case, said Justice BRENNAN at p. 445 is one

"designed principally to protect the State's consumer's against a local evil by local application."

Such legislation, said the opinion, concerned

"with the \* \* \* protection [of consumers] against fraud and deception embodies a traditional state interest of the sort which our decisions have consistently respected."

"Nor is such legislation required to yield", said Justice BRENNAN, even though "it may in some degree restrict the activities of one who holds a federal license." 374 at p. 445.

This decision upheld a State police power statute restricting the operation in one state of (1) a federal licensee (2) policed by two Federal agencies and (3) un-

questionably operating in interstate commerce. It assuredly requires rejection of the argument of appellants here that Section 9 violates interstate commerce or is invalid by reason of the supremacy clause. For their arguments to prevail this Court would, we submit, be required to withdraw its decisions which have "consistently respected" the "traditional state interest" in legislation protecting the interest of the consumers of the State (*cf.* 374 U. S. at p. 445).

Appellants (Br. p. 48) cite *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935). But as Justice CARDOZO, who wrote the opinion, said of the case when distinguishing it in *Henneford v. Silas Mason Co.*, 300 U. S. 577, 585 (1937), "the case is far apart from this one." So is *Seelig* "far apart from" the present case.

The *Seelig* case barred milk dealers buying milk outside New York from selling in New York unless they had paid for the milk in the other State the price they would have to pay for it in New York. This is the exact opposite of § 9, the statute here. The statute in *Seelig* (see Justice CARDOZO's summary in *Henneford* [300 U. S. at pp. 585-586] of his opinion in *Seelig*) directed what shall be done in other States; § 9 directs what appellants shall do in New York State.

The principle which sustains § 9 is, as Justice CARDOZO said in *Henneford* (at p. 587):

"A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere."

See further, for example, *California v. Thompson*, 313 U. S. 109, 113 (1941); *Parker v. Brown*, 317 U. S. 341, 360 (1943).

We conclude this subpoint with the following footnote in *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. at p. 331 *supra*:

“Quite independently of the Twenty-first Amendment, the Court has sustained a State’s power, within the confines of the Commerce Clause, to regulate and supervise the transportation of intoxicants through its territory.”

(B)

**As to Appellants’ Sherman Act and Robinson-Patman Act Arguments**

Appellants, since of course there is no federal statute on the subject of § 9, seeking to spell out a supremacy clause argument, do so by a series of steps. They turn to the Sherman Act and the Robinson-Patman Act. But they find that they require something more, because § 9 is not on the same subject as either the Sherman Act or the Robinson-Patman Act. Therefore, they argue that § 9 is not in accord or parallel with the policy of these two laws (Br. Point II).

Once more we recall that conflicts between state and federal regulation should not be sought where “none clearly” exist (*Huron Cement Co. v. Detroit*, *supra*, 362 U. S. at p. 446).

A State statute is not “displaced” “when the possibility of conflict with federal policy” is “remote”. Such “potential conflict is too contingent” too remote to require “a hands-off directive to the states”; to a State seeking to bring what in its judgment is equitable non-discriminatory consumer prices to its people (*International Association of Machinists v. Gonzales*, 356 U. S. 617, 621 [1958]).

The question is, as Mr. Justice BLACK wrote in *Hines v. Davidowitz*, 312 U. S. 52, 67, whether the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law with which it is alleged it conflicts.

What "obstacle" can a State law requiring all distillers and their related wholesalers to charge in the State no higher than the lowest prices they charge outside the State, present to operation of the Sherman Act or of the Robinson-Patman Act?

As this brief is being written, this Court on its last decision day, January 31, 1966, issued its opinion in *Brotherhood of Locomotive Engineers et al. v. Chicago R. I. & P. R. Co. et al.*,<sup>25</sup> in which the argument was made that the Federal government had actually pre-empted the field primarily through a 1963 Federal law so as to render unconstitutional State statutes fixing requirements as to railroad "crew consists" for interstate railroads when operating within the State. Mr. Justice BLACK writing for the Court said (quoting from *Missouri Pac. R. Co. v. Norwood*, 283 U. S. 249):

"In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews' 283 U. S. at p. 256."

The interstate railroads suing to have the statutes declared unconstitutional had charged also that the statutes were "contrary to the National Transportation Policy expressed in the Interstate Commerce Act" (34 U. S. Law Week 4103).

<sup>25</sup> 34 U. S. Law Week 4103, 4104.



### 1. As to Appellants' Sherman Act Argument.

Appellants characterize § 9 as a form of anti-trust legislation (Br., p. 21). They persist in quoting one phrase of § 8, the purpose section of Ch. 531 and omit to quote the entire sentence of which it is a part, thus taking the phrase they quote out of context and giving a totally erroneous impression of the sense in which it was used. Appellants, contradicting the Legislature which enacted the statute, the Governor who recommended and approved it, proclaim their opinion of its purpose. They then make their Sherman Act and supremacy clause argument, not on what § 9 is, but what appellants call it.

The purpose of § 9 is declared in § 8 in plain words by the Legislature to be this:

"In order to forestall possible monopolistic and anti-competitive practices *designed to frustrate the elimination of such discrimination and disadvantage*, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination." (Emphasis ours.)

As to the use in Section 8 of the phrase appellants refer to over and again—

The Legislature was repealing the ABC Law provision fixing consumer prices with the goal of eliminating the discrimination against New York State consumers in the price they pay for alcoholic beverages. This consumer price fixing was *distiller* fixed. It did not take clairvoyance to anticipate that the distillers with the control they had over the price of alcoholic beverages all down the line might take measures to keep distiller and wholesale prices high so that the elimination of the price fixing section would not lower the price the retailer would have to charge to the

consumer. It was to "forestall" such business measures "designed to frustrate the elimination of such discrimination and disadvantage" which the Legislature described as "monopolistic and anti-competitive practices" that § 9 was enacted.

Section 9 provides that each brand price to wholesalers and retailers in New York shall be no more than the lowest price for that brand outside New York.<sup>26</sup> That provision it was hoped would have the *consequence* of forestalling or eliminating monopolistic or anti-competitive practices, if any, as between brand owners or wholesalers; the *consequence* of application of the provision would be the independent action of each brand owner based on its prices outside New York. This statute does not act upon monopolistic or anti-competitive practices *between competitors*. The Sherman Act does.

There are in the economists' sense, monopolistic and anti-competitive practices which fall short of being Sherman Act violations. (*Theatre Enterprises, Inc. v. Paramount Film Distribution Corp.*, 346 U. S. 537, 541 [1954].) Under its police power the New York Legislature could act to relieve the people of the State from the high prices *resulting* from such practices without resorting to its Donnelly Act or relying upon the Sherman Act for anti-trust action.

<sup>26</sup> As the Court of Appeals opinion said (16 N. Y. 2d at p. 56):

"In effect the dependence of the New York price on the maximum price of the distiller for his brand elsewhere is to tie the price in this State in to a national price. \* \* \* The effect is on what the distiller charges here and is an effect closely associated with the sale and distribution of liquor within the State.

"That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a device within the power of the State to employ in this regulated activity."

Since this is not an anti-trust statute, what the Sherman Act does or does not permit or declare illegal simply has nothing to do with § 9.

Appellants go so far as to argue (Br., p. 28) that they could be charged with violating the Sherman Act in "collecting and disseminating this [price] information". This, as so many of their arguments, is manifestly absurd. Business organizations and trade associations constantly do this. Activities are Sherman Act violations only when they are part of an anti-Sherman Act conspiracy.

In *Maple Flooring Manufacturers Assn. v. United States*, 268 U. S. 563 (1925) at pp. 577, 579 this Court made very clear indeed that it is only when collecting and disseminating prices is part of a conspiracy evidenced by other activities to be in restraint of competition that it is in violation of the Sherman Act. *American Column & Lumber Co. v. United States* cited by appellants (Br. p. 28) is discussed 268 U. S. at p. 580 as illustrative of such a conspiratorial scheme. For a distiller to obtain its own and its related wholesalers' prices in order to comply with a State statute is hardly a conspiracy. Especially in an industry whose prices are in almost every State required to be filed with a State agency.

Finally on this point, we are reminded that there are anti-monopoly provisions<sup>27</sup> common to the liquor laws of nearly all "license" States. They are the provisions interdicting interest of one level of the liquor industry in the business of other levels of the industry. These laws take

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<sup>27</sup> They contradict appellants' assertion (Br. p. 22) that any tendency of the alcoholic beverage industry to price in an anti-competitive fashion "is a concern of the federal government and is not a problem local in character", and are in harmony with this Court's "long recognized power" in the States to enact such measures. *Watson v. Buck*, 313 U. S. 387, 404 (Mr. Justice BLACK, 1941).

the form not only of prohibiting outright ownership or management interest of one in the other, but the extension of credit or loans by one level to the other which would give a measure of control by the one upon the other. New York has such statutory provisions (§ 101, subd. 1, ¶¶ a, b, c; § 105, subds. 16, 17; § 106, subds. 13, 14). Such provisions have always been treated as state regulation of the industry to prevent monopolistic practices, not as anti-trust legislation and never required to be measured against the Sherman Act to determine whether they conflict or are harmonious with it. *United States Department of Commerce Report*, 1941, *State Liquor Legislation*, p. 20; *Pickerrill v. Schott*, 55 So. 2d 716, 718 (Fla.), cert. den. 344 U. S. 815 (1952); *Weisberg v. Taylor*, 100 N. E. 2d 748, 409 Ill. 384 (1951); *Neel v. Texas Liquor Control Board*, 259 S. W. 2d 312, 316 (1953, Tex.).

## **2. As to Appellants' Robinson-Patman Act Argument.**

Appellants' Robinson-Patman argument is, like so much else in their case, premised on their unfounded characterization of the statute. The argument fails because its premise is invalid.

As illustrative: They say (Br. p. 20) "Section 9 assumes that a geographical price differential is an inherently anti-competitive act" and the Robinson-Patman Act does not. Section 9 makes no assumption whatever about the relationships and practices with which the Robinson-Patman Act deals because that is not the problem with which Section 9 sought to deal. The problem was prices to consumers in New York State by each distiller and related wholesaler independently for its products, not in competition with another distiller's products. Distillers generally were found to be as one and as one through their wholesalers in keeping those prices high.

There were no *competitive* practices among distillers or wholesalers which affected New York prices. On the contrary. The unity of effort in this very lawsuit in which every major distiller and liquor distributor, 62 strong, has joined, demonstrates their singleness of policy insofar as pricing practices go.

Section 9 thus was not enacted to deal with competition among any segment of the liquor industry. Section 9 was enacted as one other provision enacted, in addition to repeal of § 101-C (the distiller fixed consumer price provision), for the purpose of achieving reduction of prices by *all* distillers and related wholesalers to New York consumers. The Governor and the Legislature foresaw—and their foresight has been demonstrated to have been prophetic by the same continued pricing practices of the liquor industry in New York State in the 15 months that have passed since § 101-C has been repealed and Section 9 has remained immobilized—that the repeal of Section 101-c alone would accomplish nothing. They foresaw that judging from the Industry's known practices, they would all as one keep consumer prices high by keeping distiller and wholesale prices high. It was to meet this that Section 9 was adopted.

To repeat: the premise of appellants' Robinson-Patman argument is just wrong; Section 9 is utterly unrelated to the Robinson-Patman Act, there is no issue of conflict between them, and discussion of the Act and the Supremacy Clause have no place in this action, as the State Courts have held.

To sum up in brief further the total absence of any relation between Section 9 and the Robinson-Patman Act:

1. Section 9 does not direct appellants to give discounts etc. to New York wholesalers and retailers which they give

in other states. It makes the measure of the prices in New York their lowest prices outside New York. How appellants arrive at outside New York State prices is appellants' affair. New York is concerned only that the New York prices be not higher than the out-of-State prices.

2. If appellants' Robinson-Patman Act argument were sound, New York has for 22 years been violating the Act—as have other States—in putting a total ban on price discrimination by brand owners and wholesalers among their customers, without any exception for reasons of meeting competition (Alcoholic Beverage Control Law § 101-b, the section to which § 9 makes additions).

3. Section 9 is concerned with *a distiller's own* brand prices to those who purchase its products in New York State—with complete disregard of competitors' activities and prices. The Robinson-Patman Act is concerned with competition and relationship among competitors.

4. Finally, if § 9 violates the Robinson-Patman Act, so do the Monopoly States.

Appellants by their contracts with the Monopoly States are required to warrant that their prices to them are no higher than their lowest price elsewhere (*supra*, pp. 7, 31, 51). A State may not violate the Federal Constitution or superseding federal statutes by *action* or statute. State "policy may be expressed either formally by legislation or by implied permission" (*United States v. Frankfort Distilleries*, *supra*, 324 U. S. at p. 301), and surely by uniform, consistent conditions in purchasing contracts by the State.

Certainly the distillers may not violate the Sherman or Robinson-Patman Acts by contract. These Acts indeed are directed against collusive *contracts* and discriminatory business *contracts*. As the Court of Appeals said:

"It is a strained argument to make, as plaintiffs do here that compliance with the compulsion of a public statute which seeks to keep down the price of liquor is the equivalent of an unlawful conspiracy to violate the Sherman Act." (16 N. Y. 2d at p. 59)

### **Recapitulation**

We submit that we have demonstrated that appellants have not shown Section 9 to be unconstitutional; have failed completely to sustain the burden that was theirs, seeking as they do to have a legislative enactment struck down as unconstitutional, of showing that under no possible construction can it be upheld. The tenor of their argument is all through quite the opposite. What they urge is that the section be held unconstitutional if there were a possible construction or a possible hypothetical set of circumstances under which it could conceivably be unconstitutional.

All their arguments, whether of difficulty of compliance, or violation of the Federal Constitution, are spun of a great web of conjecture and speculation, of construction, which at times amounts to fantasy, of both Section 9 and the federal acts they invoke.

And when all is done, their entire position crystallizes into a tenacious stand to retain inviolate appellants' merchandising practices for their profit; primarily to retain their high prices in New York State, where 12% of the liquor business in the nation is done, and where for a variety of reasons appellants have been able to keep their prices so high.

We have shown something of the common practices of the industry which contradict appellants' contentions of difficulty of complying with Section 9.



We have shown that burden upon those whom a police power statute affects does not impeach its constitutionality.

We have shown that under the 21st Amendment, Section 9 is an enactment within the authority of the State.

We have shown that Section 9 is not a burden on interstate commerce; and that the Sherman and Robinson-Patman Acts are utterly unrelated to Section 9.

We have shown, we submit, that the challenged sections of the 1964 Liquor Law are in all respects constitutional and valid.

### CONCLUSION

**The decision below should be affirmed and the challenged sections of the 1964 New York State Liquor Law should be held to be in all respects constitutional and valid.**

Dated: February 9, 1966.

Respectfully submitted,

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## APPENDIX A

**Some Similar Statutory Language in the Alcoholic  
Beverage Control Law Prior to § 9  
(Discussed *supra* p. 33)**

*Re:* Word "inducement".

Alcoholic Beverage Control Law § 9 of 1964 Statute (§ 101-b, subd. 3[i])

"2. It shall be unlawful for any person privileged to sell liquors or wines to wholesalers or retailers \* \* \* (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement \* \* \*"

"In determining the lowest price \* \* \* reductions shall be made to reflect \* \* \* all rebates, free goods, allowances and other inducements of any kind whatsoever \* \* \*"

*Cf.* § 101-c Minimum consumer resale prices subd. 6 (a)

"6. The authority is hereby authorized to promulgate rules which are necessary.

(a) to carry out the purpose of this section and to prevent its circumvention by the offering or giving of any rebate, allowance, free goods, discount or any other thing or service of value;"

*Re:* Words "brand owner" or "owner of brand"

Alcoholic Beverage Control Law § 101-b, subds. 3 (a)<sup>xx</sup> (c) § 9 of 1964 Statute (§ 101-b, subd. 3[d])

"3. (a) No brand of liquor or wine shall be sold within the state to a wholesaler or retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. \* \* \*

"(d) There shall be filed \* \* \* an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, \* \* \*"  
Similarly (f) of subdivision 3.

(c) The schedule containing the bottle and case price to wholesalers shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, \* \* \*"

<sup>x</sup> Amended 1964 by adding after word "inducement" the words of *any kind whatsoever*.

<sup>xx</sup> Continued with amendments in 1964 statute.

## Appendix A

§ 101-c, subd. 3 (a)

"3. (a) Such schedule shall be filed by (1) the manufacturer or wholesaler who owns such brand if licensed by the authority, or (2) a wholesaler selling such brand, who is appointed as exclusive agent, in writing, by the brand owner for the purpose of filing such schedule, if the brand owner is not licensed by the authority, \* \* \*

Re: Factors in "related person" definition, item 1<sup>xxx</sup>

§ 101, subd. 1 a, b, c

*Manufacturers and wholesalers not to be interested in retail places.*

1. It shall be unlawful for a manufacturer or wholesaler licensed under this chapter to

(a) Be interested directly or indirectly in any premises where any alcoholic beverage is sold at retail; or in any business devoted wholly or partially to the sale of any alcoholic beverage at retail by stock ownership, interlocking directors, mortgage or lien on any personal or real property, or by any other means.

(b) Make, or cause to be made, any loan to any person engaged in the manufacture or sale of any alcoholic beverage at wholesale or retail.

(c) Make any gift or render any service of any kind whatsoever, directly or indirectly, to any person licensed under this chapter which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler.

Re: Factors in "related person" definition (cont.)

§ 105, subds. 16, 17.

"16. No retail licensee to sell liquors and/or wines for off-premises con-

§ 9 of 1964 Statute (§ 101-b, subd. 3[d])

"\* \* \* As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands." Similarly (f) of subdivision 3.

<sup>xxx</sup> Item 2 of the definition which plaintiffs contend would give them trouble in compliance is discussed in the next topic of this brief. Plaintiffs raise no question as to Item 3 of the definition.

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sumption shall be interested, directly or indirectly, in any premises where liquors, wines or beer are manufactured or sold at wholesale or any other premises where liquor or wine is sold at retail for off-premises consumption, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means. \* \* \*

"17. No retail licensee for off-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer at wholesale. No retail licensee to sell liquors and/or wines for off-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer at wholesale or to any person engaged in the sale of liquors and/or wines at retail for off-premises consumption."

§ 106, subds. 13, 14.

"13. No retail licensee for on-premises consumption shall be interested, directly or indirectly, in any premises where liquors, wines or beer are manufactured or sold at wholesale, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means. Any lien, mortgage or other interest or estate now held by said retail licensee on or in the personal or real property of such manufacturer or wholesaler, which mortgage, lien, interest or estate was acquired on or before December thirty-first, nineteen hundred thirty-two, shall not be included within the provisions of this subdivision; provided, however, the burden of establishing the time of the accrual of the interest, comprehended by this subdivision shall be upon the person who claims to be entitled to the protection and exemption afforded hereby.

"14. No retail licensee for on-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer *at wholesale*."

## APPENDIX B

## Text of Sections 7, 8 and 9 of Chapter 531, Laws of 1964

§ 7. Section one hundred one-b of such law, as added by chapter eight hundred ninety-nine of the laws of nineteen hundred forty-two, subdivision four thereof having been amended by chapter five hundred fifty-one of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§ 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund. 1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person [privileged to sell] *who sells* liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity

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\* Italicized matter new; bracketed matter deleted by Chapter 531.

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of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and like age and quality [.]; (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement *of any kind whatsoever*, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold [within the state] *to or purchased by* a wholesaler, [or retailer] *irrespective of the place of sale or delivery*, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. [(b) The] *Such* schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, *the number of bottles contained in each case*, the bottle and case price to wholesalers, the *net* bottle and case price [to retailers] *paid by the seller*, [the number of bottles contained in each case,] which prices, *in each instance*, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. *Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.* [(c) The] *Such* schedule [containing the bottle and case price to

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wholesalers] shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

*(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. [(d) The] Such schedule [containing the bottle and case price to retailers] shall be filed by each manufacturer [and wholesaler who sells brands of liquors or wines] selling such brand to retailers and by each wholesaler selling such brand to retailers.*

[(e)] (c) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to



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list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state *exclusively* by such retailer.

4. Each such schedule shall be filed on or before the tenth day of each month on a date to be fixed by the authority, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licensees. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. [No brand of liquor or wine shall be sold except at the price then in effect unless written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.] All schedules filed shall be subject to public inspection, from the time that they are required to be made available for inspection by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The liquor

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authority may make such rules as shall be appropriate to carry out the purpose of this section.

5. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, on or before the tenth day after this act becomes a law, there shall be paid to the liquor authority by each manufacturer and wholesaler licensed under this chapter to sell to retailers liquors and/or wines, a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for each such licensee. A like sum shall be paid by each person hereafter applying for any such license or by the renewal of any such license, and such sum shall accompany the application and the license fee prescribed by this chapter for such license or renewal as the case may be. In the event that any other law requires the payment of a fee by any such licensee or applicant as set forth in this section for schedule listing, then and in such event the total fee imposed by this section and such other law or laws on each such licensee shall not exceed in the aggregate a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for such license.

6. *The authority may revoke, cancel or suspend any license issued pursuant to this chapter, and may recover (as provided in section one hundred twelve of this chapter) the penal sum of the bond filed by a licensee, or both, for any sale or purchase in violation of any of the provisions of this section or for making a false statement in any schedule filed pursuant to this section or for failing or refusing in any manner to comply with any of the provisions of this section.*

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§ 8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) the consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination.

§ 9. Subdivision three of section one hundred one-b of such law, as amended by section seven of this act, is hereby amended to add eight new paragraphs, to be paragraphs (d), (e), (f), (g), (h), (i), (j) and (k), to read as follows:

*(d) There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle*

## Appendix B

*and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.*

*(e) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.*

## Appendix B

(f) There shall be filed in connection with and when filed shall be deemed part of any schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, or by a related person, an affirmation duly verified by such brand owner or such wholesaler designated as agent that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner of such wholesaler designated as agent, or any related person, to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (f), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands.

(g) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to re-

*Appendix B*

*tailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month preceding the month in which such schedule is filed.*

*(h) In the event an affirmation with respect to any item of liquor is not filed within the time provided by this section, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of liquor, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule.*

*(i) In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements, of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer, as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d), (e), (f) and (g) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this paragraph, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based up-*

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on the gallon of liquor, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.

(j) Notwithstanding and in lieu of any other penalty provided in any other provisions of this chapter, any person who makes a false statement in any affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than ten thousand dollars or by imprisonment in a county jail or penitentiary for a term of not more than six months or by both such fine and imprisonment. Every affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be deemed to have been made in every county in this state in which the brand of liquor is offered for sale under the terms of said schedule. The attorney general or any district attorney may prosecute any person charged with the commission of a violation of this paragraph. In any such prosecution by the attorney general, he may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties in respect of any such proceeding which the district attorney would otherwise be authorized or required to exercise or perform, and in such prosecution the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney general or his deputy or assistant so attending.

(k) Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the liquor authority may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.



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No. 545

**Supreme Court of the United States**

OCTOBER TERM, 1965

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants*,  
*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,  
ROBERT E. DOYLE, constituting the State Liquor Au-  
thority, and LOUIS J. LEFKOWITZ, Attorney General  
of the State of New York,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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**APPELLANTS' REPLY BRIEF**

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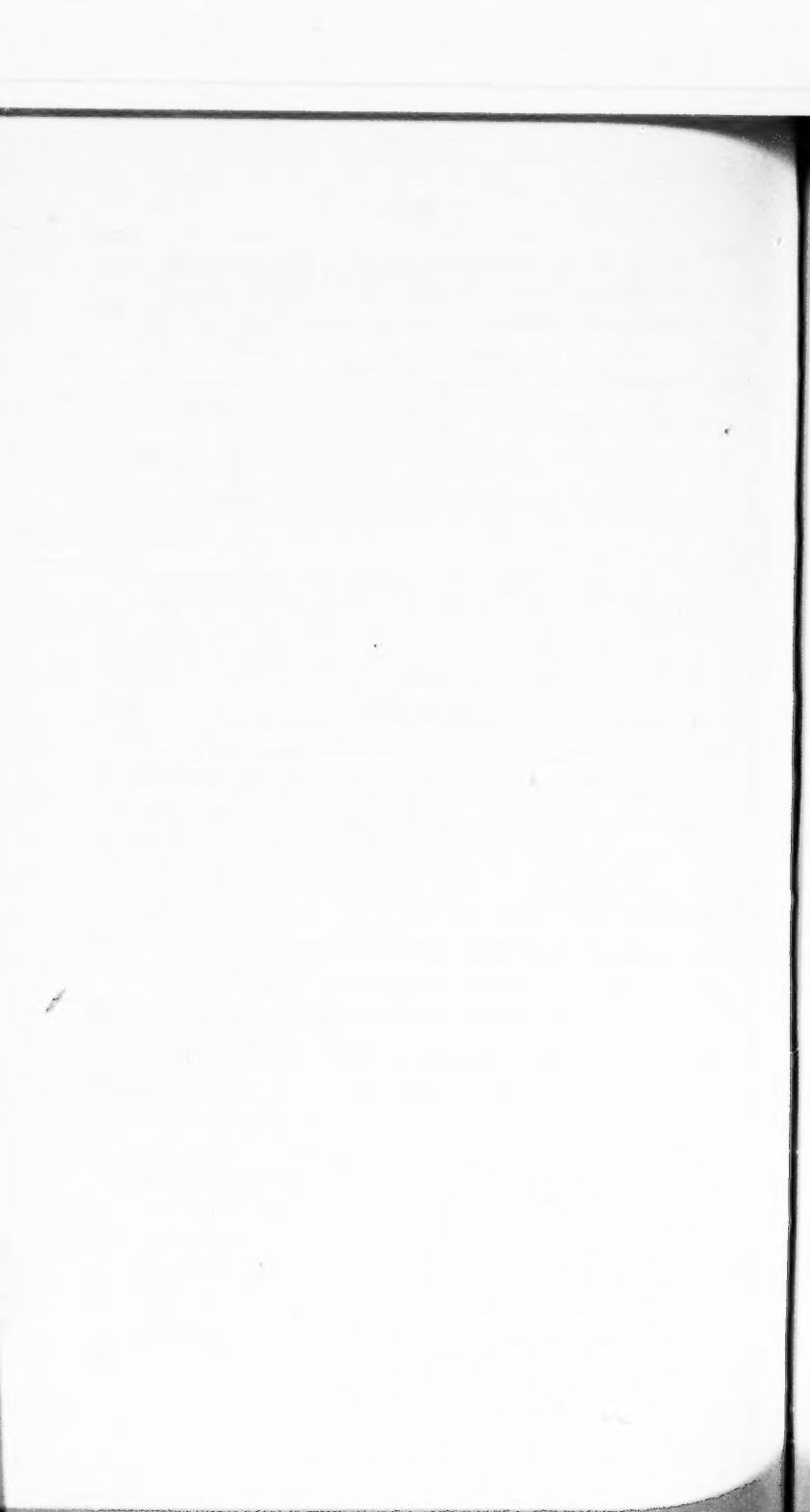
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# Supreme Court of the United States

OCTOBER TERM, 1965

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No. 545

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*

*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,  
ROBERT E. DOYLE, constituting the State Liquor Au-  
thority, and LOUIS J. LEFKOWITZ, Attorney General  
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*Appellees.*

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ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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## APPELLANTS' REPLY BRIEF

### Statement

Before addressing the points raised in appellees' answering brief, appellants would challenge certain assumptions on which appellees base their arguments.

*Appellees' Observations Concerning the Genesis of Section 9 of Ch. 531.*

From the outset, appellees avoid the rationale and asserted purpose of the enactment of Section 9 of Chap. 531.



In defending the constitutionality of Section 9 of Ch. 531, appellees allege that the occasion for the amendment was a legislative recognition that the liquor industry is not competitive. Drawing upon assertions largely outside the record and so-called 'common knowledge,' appellees would draw a picture of a closely-knit industry, dictating prices at every level of the chain of distribution throughout the country, and bent on using oligopolistic power to charge unjustifiably high prices to New York consumers. The legislature, appellees argue, passed a kind of price-fixing provision in order to give the consumer protection against the economic leverage of the industry.

Although in their brief appellees point to no prior abuses by the industry, they nevertheless attempt to inculcate in the reader a sense of unbridled power which is being recklessly used by this industry. Apparently, appellees wish to suggest—(Appellees' brief at 26)—that, in an industry where there are few companies which account for as much as 60 per cent of the total industry business, there is *ipso facto* justification for imposing maximum price limitations upon such an industry.

Thus, by this illogical process, appellees would be willing to argue that because there are three or four domestic auto manufacturers which control virtually 100 per cent of the business they, too, are within the ambit of state legislative power, and their maximum prices could also be set by the state in the exercise of its police power, without any regard to normal competitive and marketing demands in the diverse markets in this country. This illustration only serves to emphasize that the maximum price provisions here can find no justification by referring to problems peculiar to the alcoholic beverage trade; if these provisions are constitutional as ap-

plied to liquor, they are constitutional as applied to any commodity one cares to name. Since the promotion of temperance is not served by Section 9, it must be judged as would any other act seeking to restrict unjustly the right of one to set his price in response to competitive demands.

It is suggested on page 56 of appellees' brief that appellant-distillers and wholesalers have been conspiring to charge a uniform "high" price to purchasers in New York. Appellees assert that "the free enterprise for which appellants argue so vehemently in their brief has not in this industry operated in New York State." (Appellees' brief at 57). They support this finding, which would surely invoke federal and state antitrust laws if true, by referring to the wholesale prices of several brands of liquor for certain months, which were found to be identical as among the wholesalers selling such brands. Identical pricing between competitors selling several brands is determined by appellees to be conclusive proof that free enterprise is not operating in the entire market. Mere parallel pricing is not deemed a violation of antitrust law by federal courts. See *Theatre Enterprises, Inc. v. Paramount Film Dist. Corp.*, 346 U. S. 537, 541 (1954).

Furthermore, appellees rely upon these quoted prices for the assertion that they are "high" prices and thus evidence the need for the enactment of Section 9. How does one determine that a price is high, low or economically right by observing the price in a vacuum? No affidavits or economic studies support appellees' assertion, yet this court is supposed to accept this statement that the price is "high" as justification for upholding a legislative act which is not only contrary to the terms of the Sherman, Donnelly, and Robinson-Patman Acts, but which certainly

finds no justification by the State's power to protect the public health, safety and welfare. (See discussion, *infra*.)

Assuming, *arguendo*, that the industry is anything but competitive—which appellants stoutly deny, nowhere do appellees explain why New York should have been singled out by the entire industry for discriminatory high prices. Appellees' argument is self-contradictory: if anti-competitive prices were due to the structure of the industry, then such prices should have been higher throughout the country.

If, local economic conditions apart, wholesalers' prices or retailers' prices in New York were higher than prevailing prices in certain other markets, as appellees' one responsible source—the Moreland Commission report—suggests, the Moreland Commission itself ascribed the reason to, and urged the repeal of, the system of resale price maintenance required by New York statute up to 1964. Its "CONCLUSIONS AND RECOMMENDATIONS" were, in part, as follows:

#### **"A. Conclusions**

"For all of the foregoing reasons we have concluded that Section 101-c injures the New York consumer in at least three important ways:

"1. It causes New Yorkers to pay about \$1.00 a fifth more for liquor than consumers in areas of the country which do not have mandatory resale price maintenance.

"2. It eliminates competition and deprives the New York consumer of the benefits of free market efficiency.

"3. It places price-fixing power in the exclusive hands of the distillers, the group having the largest self-interest to serve, an extraordinary power which

the State should be reluctant to grant any private group, even a disinterested one.

"We also find:

"1. Compulsory resale price maintenance enforced by the State has no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol.

"2. The repeal of this system will not create law enforcement problems with which the State is unable to deal.

#### "B. Recommendations

"We make the following recommendations:

"1. Section 101-c of the ABC Law, which provides for SLA enforcement of minimum consumer resale prices fixed by the distillers, should be repealed.

"2. Although we believe that State enforcement of distiller-fixed consumer prices is completely unjustified, we recognize that its elimination represents a radical change which, when combined with the elimination of the restrictive licensing of package stores, may well have an impact on the industry and especially on some of the small retail package stores. But the interests of the consuming public must be paramount, so that the possible effect on the industry does not support the retention of this unjustified law. This is particularly true since it still will be possible for the distillers, like manufacturers of other branded products, to make private resale price maintenance arrangements under the Feld-Crawford Act." (R. at 157.)

The Governor, in his original message to the Legislature, cited the Moreland Commission Report for the following findings:

"Such a compulsory resale price maintenance is at war with the American system of free competition.

The result is that New York consumers have been compelled to pay on the average \$1 more per fifth of liquor than they would have to pay if there were a free market. This price difference is not explained by differences in excise taxes, fees and retail operating costs. The total bill for this surcharge foisted on New Yorkers now runs to \$150 million a year and it is rising every year.

This present system of price control has no significant effect upon the consumption of alcoholic beverages, upon temperance or upon the incidence of social problems related to alcohol." (R. at 188)

It is worth noting that the Moreland Commission Report made no findings that distillers charge higher prices to wholesalers in New York than they charge to wholesalers in other states.

New York wholesaler prices may well be higher than wholesaler, or even retailer, prices in other markets, if distribution costs are generally higher in New York than in some other geographically concentrated market, such as the District of Columbia. Thus, New York wholesaler prices might well be higher without any form of fair trade legislation.

Nor is there, as appellees suggest, anything sinister about continued fair trade pricing by some distillers in New York. In repealing Section 101(c) to bring prices down, and enacting Section 9 to force prices to stay low, the new legislation left the general New York Fair Trade law—the Feld-Crawford Act—applicable to liquor. Many retailers strongly favor fair trade. So do some liquor retailers. Some distillers continue to follow the option to fair trade liquor. This is simply the exercise of the same option that New York law gives manufacturers of branded

articles generally. If there is an inconsistency between enacting a law to promote fundamental principles of price competition and, at the same time, retaining a state fair trade law, the inconsistency can hardly be charged to distillers and wholesalers of liquor in New York.

In any event, judged by the plethora of fair-trade litigation brought by the liquor industry now pending in the courts of New York, the prediction of the Moreland Act Commission (R. pp. 110-111) that "Since some distillers fair-trade their products wherever possible under duress of retailers, one can view general fair-trade as a temporary obstacle to open price competition rather than an impregnable barrier to it," would appear to be borne out.

If mandatory resale price maintenance had simply been repealed—which the Moreland Commission advocated, which the Governor first sought—unsuccessfully, and which appellants do not challenge, prices in New York would be influenced—the general New York Fair Trade statute apart—by free market conditions. (See the Conclusion of the Moreland Commission, R. at 110-111). An appendage to a statute passed solely to promote temperance, having been found quite unrelated to temperance, would have simply been excised. Because New York, at the wholesale and retail levels of the liquor trade, is a separate market, insulated by state regulation from the rest of the national economy, competitive conditions might dictate wholesale and retail prices about the same, somewhat higher or somewhat lower than prices which had previously obtained under mandatory resale price maintenance.

But the legislature went further and enacted Section 9. The purpose of Section 9 of Ch. 531, as announced in

Section 8, was not to grant lower liquor prices to New York purchasers—the repeal of Section 101-c, again, as pointed out by the Moreland Act Commission, would achieve that. It was, as Section 8 proclaims, to ensure that the removal of mandatory resale price maintenance would not be frustrated by possible future “monopolistic and anti-competitive practices.” In other words, Section 9 of Ch. 531 is (whether appellees wish to use the term or not) antitrust legislation designed to thwart possible future practices which the legislature felt might be exercised in an attempt to frustrate the return to a free market in liquor through the repeal of mandatory resale price maintenance.

The constitutionality of Section 9 must be decided in light of this plainly announced legislative purpose.

Although the New York lower courts and the majority of the Court of Appeals chose to dispose of the issues here on the usual presumption of constitutionality and the broad power of a state to regulate prices generally under the police power and liquor in particular, by virtue of the 21st amendment, the Supreme Court is not bound, where state statutes affect interstate commerce, by such a presumption or by the label affixed by the state court, in determining whether the claims of state regulation would burden commerce unduly or impinge on a federal policy held to require national consistency. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 767 n. 2 (1945).

Appellees contend that there is only one question before the Court: may New York require compliance with Section 9? This reply will be limited to considering the points raised by appellees on this question.



## POINT I

Appellees argue here\* that Section 9 of Ch. 531 is "an internal regulation" of the liquor industry "within the borders of New York State," an enactment constitutionally within the state's regulatory power under the 21st Amendment. Preliminarily, it will be noted that were the Section simply an internal regulation, appellees would have no possible recourse to the 21st Amendment. The 21st Amendment is not an alternative source of state police power with regard to regulating liquor. It simply withdraws the Commerce Clause as a bar to an otherwise valid state statute related uniquely to temperance. Only if the state regulation does impinge upon interstate commerce in alcoholic beverages, does the 21st Amendment come into play. But how relevant is the 21st Amendment here? Section 9 was not enacted to promote temperance. If Section 9, weighed against its announced purpose, is a valid regulation of liquor, the same regulatory approach should be equally valid for a state to adopt, on the same announced purpose, for any other commodity.

Section 9, as Section 8 makes explicit, does not pretend to protect the public from problems uniquely associated with temperance but is instead an economic act designed to guard against possible future anti-competitive conduct; Section 9, therefore, cannot wear the mantle of the 21st Amend-

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\* Against appellees' contention here that *California v. Washington*, 358 U. S. 64 (1958) and cases cited in the Court's *per curiam* opinion, "deny appellants' essential position that State liquor legislation must affirmatively promote temperance to come within the Twenty-first Amendment," should be contrasted with the following excerpt from the Brief of the State of New York Amicus Curiae In Support of Complaint in *California v. Washington*, *supra*:

"We have found no case extending the protection of the Twenty-first Amendment to a statute adopted from economic motivations alone." (p. 11)

ment. Any power which the State of New York may have to regulate the price of liquor in order to bring about the "fundamental principles of price competition" and "to forestall possible monopolistic and anticompetitive practices" is derived simply from the police power. State regulation unrelated to coping with the peculiar problems of temperance but which is merely directed toward reducing the prevailing price level for alcoholic beverages is as much subject to the Commerce Clause as would be similar regulation involving any other commodity. Conversely, for state legislation to enjoy the protective mantle of the 21st Amendment, as against conflicting federal legislation or the Commerce Clause, the regulation must have some reasonable connection, however indirect, with the promotion of temperance. In appellants' view, therefore, the 21st Amendment is simply irrelevant. Appellees virtually concede as much in arguing that if some commodity other than liquor—"bicycles, cosmetics, or furniture," were involved, the regulation would still be valid.

Is Section 9 simply "an internal regulation" of the liquor industry "within the borders of New York State"? In terms of its operation, the statute is not simply an internal regulation of the state: it delegates, in the name of state regulation, the power to determine the wholesale price in New York to a random "related person" wholesaler somewhere in the United States. The statute is directed precisely towards tying prices within New York to the lowest price outside of the state. What New York has done is to renounce any peculiarly local solution. In flat contradiction of its announced rationale, in operation Section 9 evidently seeks to compel the New York wholesalers to follow the most depressed market conditions facing any related person wholesaler in the United States—whether brought about by chronic price wars, surplus stocks or any other rea-

son—all purportedly in order to benefit the New York consumer.

But, in terms of effect, it is very likely, as the majority of the Court of Appeals blandly recognized, to cause an increase in prices across the country.

Again, while the 21st Amendment gives New York the power to bar liquor from its borders and confirms its wide discretion to regulate liquor within its borders, it gives New York no power to regulate beyond its borders, to legislate extraterritorially. *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945). Not even Mr. Justice Frankfurter's concurrence, much relied upon by appellees although the *Frankfort* majority expressly declined to follow him, went so far. And see *Nippert v. City of Richmond*, 327 U.S. 416, 425n.15 (1946).

Even when Congress has denominated a subject as peculiarly appropriate to local regulation and expressly delegates broad power to the States to enact economic regulation and tax as it has with regard to the insurance industry under the McCarran-Ferguson Act, where the argument has been made that state regulation has precluded any form of federal regulation irrespective of interstate consequences, the courts have rejected it. *F. T. C. v. Travelers Health Ass'n*, 362 U.S. 293 (1960) (Section 2(b) of the McCarran-Ferguson Act does not oust Federal Trade Commission jurisdiction, where the practices of the insurance company took effect outside the borders of a state). See *In re Grand Jury Investigation of the Aviation Insurance Industry*, 183 F. Supp. 374 (S.D.N.Y. 1960); *U.S. v. Chicago Title & Trust Co.*, 242 F. Supp. 56 (N.D.Ill. 1965). The 21st Amendment cannot be used to insulate Section 9 from conflict with other constitutional provisions

or conflicting federal statutes. To hold otherwise would allow a state to contravene any federal act at will as long as the object of the state law—regardless of the problem to which it is addressed—is the liquor industry. See *Jatros v. Bowles*, 143 F.2d 453, 455 (6th Cir. 1944). Were the result otherwise, our federal system would simply break down.

## POINT II

There is no quarrel here with the general proposition that control of the maximum price of virtually any commodity may, under sufficient circumstances, be a proper exercise of the police power. If the legislature were persuaded that effective regulation of liquor consumption required complete control of liquor distribution, New York could properly undertake the distribution and sale of alcoholic beverages itself, set its own prices, and take a middleman's fee or not, as it saw fit. But so long as New York permits the distribution and sale of liquor to remain in private hands, those engaged in the business are entitled to constitutional guarantees, including due process. Appellants challenge the view of the majority of the Court of Appeals, cited by appellees, characterizing those engaged in the liquor industry as somehow stained and entitled only to second-class citizenship:

“A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture.”  
R. at 346.

It is true that in recent years the Supreme Court has been most reluctant to strike down a state statute on substantive due process grounds where there is any possible connection between the requirements of the statute and its announced purpose. But even the limited inquiry which, under prevailing opinions, the Supreme Court will undertake, must bring into question the rationality of this state economic regulation. To appellants, it requires no major intellectual expedition to doubt a connection between ends and means here: to ask the question in the various forms in which it may be posed, is to answer it.

Does this legislation have any rational basis? Is it "substantially related to a legitimate end sought to be obtained"?\* The sole police power rationale of the New York ABC law, as set forth in Section 2 of that law, makes it clear that it is the policy of New York to regulate alcoholic beverages "for the purpose of fostering and promoting temperance . . . and respect for and obedience to the law." Does Section 9 promote temperance?

The majority of the Court of Appeals upheld the amendment as a valid exercise of the police power, on the ground that the legislature presumably felt it was a temperance measure, and the majority preferred to take the legislature's—unstated—word for it rather than appellants' 'prejudiced' arguments. To appellants' simple observation that if high prices do not encourage temperance, low prices would hardly be expected to either, the majority replied:

"Throughout the argument of plaintiffs on constitutional and other issues runs the thread of their contention that the 1964 statute is not suited to the

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\* *Cities Service Gas Co. v. Peerless Oil & Gas Co.*, 340 U.S. 179, 186 (1950).

promotion of temperance and hence the main justification of a valid regulation of liquor is lost.

"In summarizing their position in a reply brief plaintiffs say: 'At issue here is whether Section 9 of Ch.531 affirmatively promotes temperance.' As to what best promotes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry." R. at 350.

The minority of the Court of Appeals had no such difficulty in recognizing the obvious:

" . . . It comes down to this: mandatory establishing of minimum prices for sales by bottle or case of 'brand name' alcoholic beverages is beyond the power of our State legislation, is an unconstitutional (U. S. Const., 5th and 14th Amdts.; N. Y. Const., art. 1, §6) taking of private property without due process or compensation, and is not justified as a police power exercise *since it is not necessary for or related to the health, safety, morals or welfare of the State's inhabitants or required by any emergency.*

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" . . . No one has yet told us how any of these lawful purposes could be accomplished or furthered by forcing liquor prices down to the bottom level found anywhere in the United States. To promote temperance by making intoxicants cheaper is like trying to minimize the dangers of excessive smoking by abolishing cigarette taxes.

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"It is suggested that we should respect and accept the judgment of the Legislature and the Governor that price limitation will further temperance. But the assumption that such was the purpose runs against the declared fact. Neither the Governor nor the Legis-

lature ever offered such a vain argument, and we must remember that sections 7 and 9 were not among the recommendations of the distinguished Moreland Act Commissioners appointed by the Governor. Temperance is a laudable objective and a proper State purpose but no one has the temerity to assert that cut-price liquor cuts down drinking. Therefore, it follows of absolute necessity that these amendments have nothing to do with the State policy written into section 2 of the State Alcoholic Beverage Control Law right after repeal of National Prohibition 'to regulate and control the manufacture, sale and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to law.'" [Emphasis supplied] R. 350-3.

Appellees rely on the general proposition that "Our statute is under New York's police power for the benefit of all the people" [sic]. (Appellees' Brief, p. 50.) Yet appellees never come to grips with Section 2 of the ABC Law and Section 101-b of the same law, which declare that the promotion of temperance is the goal of liquor regulation. Appellees' disregard of these sections leads one to ask: How does a legislatively mandated low price distilled liquor affirmatively serve the general public? The police power is phrased in terms of an affirmative improvement of the health, safety and welfare of the community. A law impinging on the rights of private property cannot be upheld merely because it does no *harm* to the public health, safety or welfare.

Does Section 9 apply fundamental principles of price competition to the sale of liquor in New York? It is an elementary principle of economic theory that prices should reflect the balance of demand and supply in a given market, from moment to moment. What can a bizarre price ceiling



dictated by conditions in some other market two months previously and rigidly imposed for a period of a month in New York, have to do with this principle? The fundamental principles of price competition do not dictate any particular level of prices, least of all the lowest of the low arrived at in some quite different market. If liquor price control is a permissible exercise of the state police power on any assumption, it certainly cannot be justified in the name of "fundamental principles of price competition." The mechanism adopted flatly contradicts the principle invoked: the baby is thrown out with the bathwater.

Appellees' argument is laced with emotive references to economic "menaces" as exemplified by supposedly discriminatory prices charged by wholesalers and retainers in New York as compared with the District of Columbia, for example. But is it so very astonishing that different markets should have experienced different prices, particularly where resale price maintenance was required by one jurisdiction and the other has no fair trade law?

Is the end to forestall possible anticompetitive practices? The record being barren of any legislative study of possible anticompetitive threats, appellees rely on academic studies of some vintage to supply the occasion for such regulation. But the notion that the "industry" has been discriminating—or may at some future date discriminate—against New York consumers is unexplained. Why New York? Should such discrimination occur, why not enforce the Donnelly Act or complain to the federal enforcement agencies, if, as intimated, collusive practices are so notorious in the New York liquor industry alone as to raise prices by a hundred million dollars a year or more?

Mandatory resale price maintenance did, to be sure, conflict with fundamental principles of price competition. But how a price-fixing requirement can be defended as designed to promote the fundamental principles of price competition or to prevent anticompetitive practices is curious.

There is nothing in the record to suggest that profits to any segment of the liquor industry—distiller, wholesaler or retailer—from sales in New York are abnormal. Quite the contrary, the record shows that costs in New York are higher than elsewhere in the country and profit margins of New York wholesalers and retailers are very low.

Appellees' attempt to dispose of appellants' real concern that the statute is intolerably vague, has been met by appellants' main brief. Any occasional difficulties in compliance, appellees imply, will be settled by the State Liquor Authority. (Appellees' Brief, pp. 59-60.) An unguaranteed offer of amnesty cannot cure an unconstitutional statute. This suggestion is rendered even more venal when one recalls that it was allegations of scandal arising from abuses of discretion by the State Liquor Authority in ruling on retail liquor license applications that led to the appointment of the Moreland Commission.

### POINT III

Conscious of the weakness of attempting to justify Section 9 on the extravagant argument that, the commodity regulated being liquor, the 21st Amendment simply removes such regulation from judicial scrutiny, appellees finally address the central issue in this case, arguing that this regulation would be equally constitutional were it directed at a commodity other than liquor: it does not, they

assert, burden interstate commerce unduly; there is no supremacy clause problem because the Sherman and Robinson-Patman Acts involve other subjects, directed towards other remedial goals.

### **Supremacy Clause**

Appellees claim that Section 9 of Ch. 531, requiring distillers and "related person" wholesalers to charge a price in New York no higher than the lowest price charged elsewhere, is not an antitrust act. They claim appellants merely deem it so and that this labeling by appellants cannot support a challenge that Section 9 of Ch. 531 conflicts with federal antitrust laws in contravention of the supremacy clause of the federal constitution, Article VI.

Thus, appellees would limit the absolute power of the supremacy clause to invalidate state statutes in conflict with federal statutes only to cases where the state statute demonstrably has the same primary goal as the offended federal statute. Under appellees' analysis, the fact that those attempting to comply with the state statute would have their rights under a federal statute reduced, or would be required to do more than the federal statute requires, is not germane.

Appellees' contention is in error on several counts. First, the legislative purpose of the act as set forth in Section 8 of Ch. 531 deems the requirements of Section 9 to be necessary "to forestall possible monopolistic and anti-competitive practices." Could an antitrust rationale be stated much more clearly?

Although the issue has not in all respects been conclusively settled with respect to antitrust legislation, it seems that Congress has not preempted the field. Rather

a dual—but consistent—system of enforcement, federal and state, is called for.

Conceding that a conflict should not be sought where none clearly exists, appellants believe that appellees misapply, if they do not misconceive, the test of a conflict with a paramount federal pronouncement sufficient to invalidate a contradictory state statute. To be sure there must be some identity of the matter being subjected to different rules. There is here. But appellees contend that the remedial goals are different, as if the question could be disposed of so readily.\* Are the goals of the Sherman Act so different from a state statute invoking the “fundamental principles of price competition” and expressly intended to guard against possible anticompetitive practices? Are the ‘respective’ goals more different than they were in

*Northern Securities Co. v. United States*, 193 U. S. 197 (1904) (liberal state incorporation laws no bar to federal antitrust suit)?

*United States v. South-Eastern Underwriters Ass’n*, 322 U. S. 533 (1944) (state regulations designed to prevent competition in the insurance industry as harmful to insured and insurers, no bar to Sherman Act prosecution)?

*Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384 (1951) (non-signer clause of state fair trade statute

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\* Furthermore, labels are not determinative in this issue. Regardless of what the maximum pricing requirements of Section 9 of Ch. 531 are called, the only issue to be resolved is whether they in fact impinge upon the terms or policy of federal acts. In this case, as appellants have demonstrated, they conflict with the terms and policy of federal antitrust acts. If they contradicted federal acts dealing with other subjects, they would be just as invalid.

unenforceable as beyond the limited Miller-Tydings' exemption to the Sherman Act)?

*Cf. Local 24, International Brotherhood of Teamsters v. Oliver*, 358 U. S. 283 (1959) (conduct prohibited by state antitrust law excused by paramount national labor relations policy)?

*Cf. State v. Texaco, Inc.*, 14 Wis. 2d 625, 111 N.W. 2d 918 (1961) (recognizing possibility of conflict between state pricing prohibition and conduct permitted by Robinson-Patman Act)?

As for the relevance of a given price level to antitrust policy, it was early contended that a restraint on the price mechanism should be open to defense on the ground that the result was reasonable, that the prices were only fair, and that the public suffered no injury. The courts soon declined to follow the rule of reason so far. The reasonable price of today might be unreasonable tomorrow, even if it were feasible to pass judgment on the reasonableness of the price today. Rather than set sail upon such a sea of doubt, the courts preferred to place a *per se* ban on collusive tinkering with prices.

*United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 293 (6th Cir. 1898) (per Taft, Circuit Judge), *aff'd* 175 U.S. 211 (1899):

"It has been earnestly pressed upon us that the prices at which the cast-iron pipe was sold in pay territory were reasonable. A great many affidavits of purchasers of pipe in pay territory, all drawn by the same hand or from the same model, are produced, in which the affiants say that, in their opinion, the prices at which pipe has been sold by defendants have been

reasonable. We do not think the issue an important one, because, as already stated, we do not think that at common law there is any question of reasonableness open to the courts with reference to such a contract. Its tendency was certainly to give defendants the power to charge unreasonable prices, had they chosen to do so."

*United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98(1927):

"That only those restraints upon interstate commerce which are unreasonable are prohibited by the Sherman Law was the rule laid down by the opinions of this Court in the *Standard Oil* and *Tobacco* cases. But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable . . .

"The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legis-

lation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable — a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies."

If the underlying philosophy of the federal antitrust laws is indifferent to the "reasonableness" of prices, still less does it insist that prices be no higher than the lowest in some unrelated market.\* The Sherman Act is concerned only with the structural conditions of which a peculiar price pattern may be some evidence, and the conduct by which a price was arrived at.

This is not the occasion for the Court to pass upon the degree of workable competition in the liquor industry. In view of the maze of regulation and unique sumptuary imposts at both the federal and state levels such an inquiry would be more academic than anything else. There may well be industries which, in terms of structure, conduct and performance, may be characterized as likely to be more competitive than the liquor industry. Equally there may be a number of important industries which, by the same standards, should be characterized as less likely to be competitive than the liquor industry. Whatever the degree of competition in the liquor industry, Section 9 will do nothing to increase it.

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\* For an analysis of the fallacy—both in economic and legal terms—that competition is measured or enhanced by compulsory price reductions, compare Statement of Professor Eugene V. Rostow Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, United States Senate, Concerning S. 1552 (December 7, 1961), 6 Antitrust Bulletin 606, 617-20 (1961).



By the standards of "workable competition"\*, which the federal antitrust laws seek to perpetuate, what are the likely incidences of this amendment?

(1) There is likely to be less price competition (as well as less non-price competition in the form of advertising, etc.) between distillers, which will of course tend to make present market positions semi-permanent.

(2) There is likely to be some squeeze on the number of wholesalers in New York—and therefore fewer alternative channels of distribution for the smaller distillers, in particular, and correspondingly, fewer alternative sources of supply for New York retailers.

(3) The wholesaler in New York will be guided by someone else's profit and loss experiences.

(4) Any incentive for new entry at the wholesale level in New York would disappear.

(5) The retailer will tend to be benefited—relatively speaking, and the wholesaler penalized, by considerations which price competition cannot justify.

(6) The plight of New York wholesalers might well induce efforts to mitigate the full force of the amendment—which would require collusion between a distiller and its respective wholesalers across the country.

Neither in approach nor in likely consequence is there any compatability between Section 9 and the basic federal antitrust statute, the Sherman Act. Indeed, compliance will invite conduct very much at odds with the standards of the Sherman Act.

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\* E.g. Edwards, *Maintaining Competition* 9-10.

Appellees argue that the New York statute does not conflict with the Sherman Act because the New York statute does not act upon monopolistic and anticompetitive practices between competitors and the Sherman Act does. But the Sherman Act is concerned, and very much so, with restraints on distribution as between a manufacturer and his wholesale and retail distributors. The artificial relationships called for by the New York statute are wholly at variance with the policy, and call for conduct contradictory to, the mandates of the Sherman Act.

In order to comply with the requirements of the New York law a seller must perform certain activities quite incompatible with federal antitrust law:

- (1) Every brand-owner distiller who wishes to sell within New York as well as in other states, must develop a network of communication for the monthly gathering of pricing statistics from "related person" wholesalers for the explicit purpose of informing New York wholesalers what future prices to fix.

- (2) Faced with a "related person" wholesaler unwilling to divulge his lowest prices, the brand owner must either coerce this information from the wholesaler or face foreclosure of his brands for a month from the largest single market in the country.

- (3) In negotiating prices with buyers in other states and the District of Columbia, the distiller must weigh the effect of such a price upon the price of the same brand in New York, with the inevitable tendency to set prices at artificially higher levels outside New York in an attempt to balance the effects of such prices within New York.

- (4) New York wholesalers, especially the smaller ones, when forced to price at a level no higher than the lowest price in any other state or the District of

Columbia, and reflecting "all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler"—irrespective of their own higher labor and operating costs, will press the distillers to police wholesaler prices in other states to prevent the bankruptcy of their New York kin. The only effective means to police a "cut-rate" wholesaler is to threaten to refuse him further supplies or actually drop him and restore him as a wholesaler only upon an undertaking not to price below the level suggested.

When appellees dismiss, with the wave of the hand, appellants' concern that the collection of information from across the country in order to fix prices in New York could be regarded as contrary to the Sherman Act on the grounds that trade associations are constantly doing just this, they—and any such trade associations—ignore classic warnings of this Court regarding joint activities affecting prices outside the narrow confines of the fair trade exemption.

But the real issue is not so much a question of liability to antitrust prosecution, but rather the most serious kind of conflict\* between a bizarre state regulatory scheme and paramount federal law as interpreted for the better part of 70 years. Not only does the New York law engender

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\* Compare the following from the brief of the United States as *Amicus Curiae* in *Schwegmann Bros v. Calvert Distillers Corp.*, *op. cit.*, *supra*:

"It may be argued that the only action complained of here is the action of the state in enacting the non-signer clause. That argument misconceives the issue. The state is not charged with violating the Sherman Act. The question is whether respondents may secure enforcement of a state law which purports to forbid price competition in an area where valid federal legislation has decreed its maintenance.<sup>4</sup> The problem is not one

and promote activities which are associated with forbidden conspiracies and which actually constitute proscribed contracts, combinations and conspiracies—the statute goes further; it kills the whole spirit of the Sherman Act. As stated by Mr. Justice Black in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958) the Sherman Act was designed as a

“... charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress . . .”

The New York law flies in the face of this concept.

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of application of the Sherman Act to a state, but of application of the Supremacy Clause of the Constitution to a state statute in a field of interstate commerce which Congress has occupied. This Court has said that ‘a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it \* \* \*.’ *Parker v. Brown*, 317 U.S. 341, 351.<sup>5</sup> Here, Louisiana seeks to force adherence by all retailers to a price schedule promulgated by private persons. Apart from any exemptions created by the Miller-Tydings Act, state law thus thwarts the rule laid down by Congress, since voluntary adherence to such price schedule with knowledge of like adherence by others would violate the Sherman Act. *Interstate Circuit v. United States*, 306 U.S. 208.”

4. Even absent an express conflict, a state statute cannot survive which ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’ *Hines v. Davidowitz*, 312 U.S. 52, 67.

5. Cf. *Northern Securities Co. v. United States*, 193 U.S. 197, 345-346: ‘No State can, by merely creating a corporation, or in any other mode, project its authority into other States, and across the continent, so as to prevent Congress from exerting the power it possesses under the Constitution over interstate and international commerce, or so as to exempt its corporation engaged in interstate commerce from obedience to any rule lawfully established by Congress for such commerce.’” (pp. 7-8).

What, then, of the argument that New York may be concerned with restraints which have not yet matured into sufficient evils to be cognizable under the federal laws? Nothing in the record, or indeed nothing which appellees seek to invoke outside the record, indicates that whatever imperfections or blemishes the liquor industry might reveal, lie wholly beyond the reach of the paramount federal statutes of general applicability. Section 5 of the Federal Trade Commission Act may reach potential Clayton and Sherman Act violations in their incipiency. See *FTC v. Motion Picture Advertising Service Co.*, 344 U. S. 392, 394-5 (1953).

Next, appellees attempt to show that certain other provisions of the New York ABC Law can also be said to be violative of the Sherman Act. But these provisions arguably promote temperance and would, unlike Section 9, therefore be protected by the 21st Amendment. Moreover, whether other sections of the ABC Law also violate the Sherman Act is hardly relevant when an action is brought testing the compatibility of Section 9 of Ch. 531 with these federal acts.

As to appellees' assertion that Section 9 is utterly unrelated to the Robinson-Patman Act and, therefore, there can be no issue of conflict, appellees misconceive the question: the Robinson-Patman Act permits discounts to be given in certain circumstances. This right is denied to appellants by Section 9.

Nor is it any answer to argue that if appellants' Robinson-Patman Act argument is sound, New York has for 22 years been violating that Act. Suffice it to say that prior to 1964 the regulations of the State of New York banning price discrimination were premised on being in furtherance of temperance and, therefore, protected under the 21st Amendment against challenge under the com-

merce clause or from statutes deriving their authority from the power of Congress to regulate commerce under the commerce clause. Moreover, such price regulations had no direct impact outside the State of New York.

To say that because Section 9 is concerned with a distiller's own prices—in complete disregard of competitors' prices — and not, as is the Robinson-Patman Act, with a distiller's prices vis-a-vis those of his competitors' (Appellees' brief, at 74), and therefore there is no conflict, overlooks the essential point of the "meeting competition" defense in subsection (b) of the Robinson-Patman Act: a seller should—indeed, must—consider his competitor's prices and the Robinson-Patman Act so permits him. But, again, in the name of forestalling possible anticompetitive practice, the New York statute forbids it. It is elementary that a state statute which condemns what federal statutes permit, must fall.

Appellees contend that if Section 9 conflicts with the Robinson-Patman Act, so do the control states by their resort to warranties (Appellees' Brief p. 74). In appellants' view this case does not require the Court to pass on the peculiar status of those warranties.

The undertaking called for by the so-called control states' warranties is clearly distinguishable from the dictates of Section 9: it is merely contractual and carries no penal sanctions. By contrast, under Section 9 the control of the wholesale price to be charged lies in the hands of any "related person" wholesaler—over whom, typically, neither the distiller nor a New York wholesaler has any legitimate control. It is the essence of the scheme of regulation employed by the so-called control states that the states themselves have gone into the business of distributing and

selling liquor. The weight of authority is to the effect that the Robinson-Patman Act does not apply to transactions with states or state agencies. *E.g. Sachs v. Brown-Forman Distillers Corp.*, 134 F.Supp. 9, 16 (S.D.N.Y. 1955) *aff'd per curiam* 234 F.2d 959 (2d Cir. 1956), *cert. denied*, 352 U.S. 925 (1956). See Rowe, *Price Discrimination Under the Robinson-Patman Act* 84-5 (1962).

That is not to say that a state may not under certain circumstances completely renounce the competitive model as a guide for the sale of alcoholic beverages within its borders and simply fix the prices at which such business shall be conducted. But here the state has not done so. Leaving the distribution of liquor in private hands, it delegates the pricing decision to out-of-state sources to determine what price shall be the lowest of the low, whatever the reasons.

Appellees argue that even though the terms or policy of the Robinson-Patman Act may be violated, such conflict is justified because New Yorkers were discriminated against by distillers and wholesalers in the past, and other laws have also violated the Robinson-Patman Act. Obviously, without regard to the truth of these assertions — which appellants have shown to be without foundation — such contentions are irrelevant when appellants bring before this court evidence that Section 9 of the Ch. 531 is in conflict with the Robinson-Patman Act.

Once it has been shown that the terms of Section 9 of Ch. 531 are in conflict with the terms and policy of the Sherman and Robinson-Patman Acts inquiry is at an end. A violation of the supremacy clause occurring, a court is bound to strike the offending state legislation.



### Interstate Commerce

Appellants have no general quarrel with appellees' statement that proper state action may have repercussions beyond state lines. But to say that where Congress has not acted and where the nature of the regulation requires no uniform national approach the fact that state action may have repercussions beyond state lines does not *per se* invalidate state law, only begs the question as to whether or not Congress has acted. See the discussion of the Supremacy Clause issue, *supra*.

The test of a state's wide latitude to experiment with different approaches to matters of essentially local concern, has been stated in a variety of ways but may be fairly summarized thus: if there is some effect on commerce, the burden of that effect on the national economy will be weighed against the hoped-for benefit at the local level. If the likely burden outweighs the benefits to be anticipated, the state regulation will fall even where there has been an otherwise valid exercise of the state police power.

But where the local regulation not only lays a heavy burden on interstate commerce but discriminates as well against out-of-state interests, then the state has the obligation to demonstrate that no reasonable alternative is available. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951).

How likely is Section 9 to bring about the desired benefits? Does it permit "fundamental principles of price competition"? or "forestall possible monopolistic and anticompetitive practices"?

If it grinds the New York wholesaler between the pestle of the "lowest of the low" and the mortar of his own hard costs, will it benefit the retailer? Is this a sufficient benefit to outweigh the burden?

Is it so clear that the consumer will benefit? Is a somewhat cheaper retail price for a bottle of liquor in New York, a suitable counterweight for a clog on commerce?

Assume that the retail price level in New York may weaken somewhat: does Sec. 9 burden commerce? Does any burden discriminate against out-of-state interests? There is first, of course, the sheer difficulty, to say nothing of the expense, of compliance. As to the effect on prices, particularly at the wholesale level, there are several possibilities:

(1) Prices elsewhere will rise to prevailing New York levels. In that event, the rest of the country may well complain even if the majority of the Court of Appeals is unconcerned by the prospect.

(2) Wholesale prices in New York will be forced down to the more or less arbitrary level obtaining in some different market — in which case the statute discriminates against the smaller New York wholesaler. With the small profit margins prevailing, he may well be forced out of business, which deprives out-of-state distillers of a possible distributor.

(3) Both tendencies may appear, as efforts are made to offset the worst impact of the statute. In that event, the hoped-for benefit will be diminished, *pro tanto*.

The majority of the Court of Appeals holds that the no higher-than-the-lowest provision is on an equal footing with tying the price to a national index based either on the average price for the commodity or on some cost-of-living formula. To the majority of the Court of Appeals, it is all one.

The analogy is apt only insofar as it illustrates that the no-higher-than-the-lowest price elsewhere is essentially a resort to a national approach, a solution which

might more properly come from a national legislature. But there, appellants believe, the analogy stops. Surely, compelling a businessman to sell at the lowest price quoted by some other businessman anywhere else, is not the equivalent of selling at an average price.

The impact of the amendment is, to a degree, speculative. But the majority of the Court of Appeals was fully prepared to speculate: to them the fact that the amendment might result in a general increase in prices across the country was simply not relevant to the constitutionality of the amendment:

“Under section 9 the distillers themselves control the base price since they fix the lowest price elsewhere. If its effect on New York is too low a price they have it within their power to raise the lowest price elsewhere. The industry must absorb any differential cost in doing business as one of the incidents to a highly regulated industry. The incidental effect of this on prices in another State does not invalidate the New York statute.” (R. at 347.)

It is difficult to imagine any more far reaching exegesis of state police power than this, a classic statement that the tail should be free to wag the dog. But if the tail wags the dog, it remains — for the majority of the Court of Appeals and appellees — the tail and, therefore, the effect on commerce must be, by definition, only incidental. If this reasoning is upheld, future judicial inquiry into burden v. benefit under the commerce clause is, as a practical matter, foreclosed.

It will be noted that section 9 does not “bite” except where a brand is sold in New York and in some other state also. A brand, be it advertised or private label, is quite untouched by Section 9 if its sales are confined to

New York. Does this suggest a non-discriminatory solution to a local problem, affecting interstate and intrastate interests equally, or does it smack a little of provincial favoritism?

If, as appellants believe, this regulation embodies — directly and indirectly — serious discrimination against out-of-state interests (by definition without representation in the New York legislature), has the state sustained the burden of demonstrating no reasonable alternative which would be less discriminatory and burdensome?\*

To appellees' contention that the burden and the discrimination are only speculative, it may be replied, again, that the benefits to be anticipated are, if anything, even more speculative.

Appellants concede that where the nature of the beast and congressional inaction, point to the desirability of perrmitting the states to experiment with local solutions to local problems, the result may be a valid exercise of the police power, and the statute will not fall because there is some incidental effect on interstate commerce. But here any purely local approach has been abandoned. The unique aspect of this case — stated in broadest terms —

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\* There have, indeed, been confrontations between segments of the liquor industry and the Antitrust Division of the Justice Department—over problems of size, pricing tactics by a distiller and its distributors, by groups of distributors, and a merger. The Federal Trade Commission, for its part, is not entirely unfamiliar with the industry. The history of antitrust litigation involving the distilled spirits industry, under both federal and parallel state statutes, while not so well developed as is the case in many other industries, is still mature enough to demonstrate that statutes of general applicability have served to cope with anticompetitive problems as they have arisen. There is no suggestion that the injunctive relief which has been decreed has proven ineffective. Should anticompetitive practices occur anew, there is no basis for assuming that antitrust prosecution would be an idle gesture.

is the effort of a state, in the name of local regulation, to require a national solution to the problem of local prices. And not only a national solution, but perhaps the most extreme application of a national solution that could be devised.

Once again, does Section 9 also discriminate against out-of-state interests as the price for access to the nation's largest single liquor market? If so, has the state negated the possibility of an alternative, less discriminatory burden which would accomplish its announced goals of promoting fundamental principles of price competition, discouraging possible anticompetitive practices?

Appellees have not substantiated their claim that appellants and "related person" wholesalers doing business in New York were exacting unjustifiably higher prices from their New York purchasers before the passage of Section 9. In fact, as pointed out, appellees cannot so allege because Section 8 of Ch. 531 makes it clear that the Legislature was concerned only with forestalling *possible* anti-competitive practices when it enacted the maximum price legislation contained in Section 9. Appellees do allege that the Legislature wished to give the New York purchaser liquor at cheaper prices. Announced rationale of Section 9 aside, the only possible purpose of the provision is to favor the New York retailers and consumers regardless of the consequences to the industry in the rest of the country. Is such a state statute valid? "Where a state law has no other purpose than to favor local industry, this balancing of interest approach probably will not be used, inasmuch as the purpose of the state regulation would be illegitimate." Stern, "*The Problems of Yesterday-Commerce and Due Process*", 4 Vand. L. R. 446, 458 (1951).

For this reason, appellants rely upon a line of Supreme Court decisions commencing with *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935), which hold that states may not enact legislation — even if such legislation is arguably justified by the police power — which seeks to benefit the citizens of the legislating state at the expense of those operating in interstate commerce. Appellees do not challenge the holding of this case or of its successor, *H. P. Hood & Sons, Inc. v. DuMond*, 336 U. S. 525 (1949). The fact that in *Baldwin* the state attempted to exact economic advantage for its citizens in a manner different than that at issue here does not vitiate the authority of that holding.

Nor are appellees' arguments concerning the effect this legislation will have upon legislation in other states persuasive. (See Appellees' Brief, pp. 64-6.) None of the cases cited by appellees concern — as is the case here — state legislation which, by its very terms, forces the objects of such legislation to predicate their conduct in other states upon the effect such conduct will have on their ability to comply with the statute of the legislating state.

### CONCLUSION

This case presents the most serious questions regarding the manner in which a state regulatory scheme may intrude upon the national economy. The consequences of the principle that a state may require that prices within its borders may be dictated by a price determined by dealings between citizens of some different state, and the repercussions of such a scheme throughout the nation, cannot — as appellees themselves acknowledge — simply be dismissed on the ground that the commodity here involved is liquor.

The issue is not the role of positive government, state or federal. The issue is rather the extent to which a state may be allowed to burden interstate commerce, discriminate against out-of-state interests for local advantage, and contradict paramount federal policy in the name of a local experiment with economic regulation. If a state's solution to a problem characterized as of only *local concern*, is to give itself the benefit of a *contrived national formula*, and if it is all one whether local prices are tied to a national index, or depressed to the lowest instance which may fortuitously occur anywhere, or raised throughout the rest of the country, may this be simply excused by invoking 'the convenient apologetics of the police power'? "The constitutional problem is not how to divide a fixed quantum of governmental authority between state and nation, but how to guide the evolution of governmental institutions in ways that fulfill the purposes of the federal conception." Rostow, *The Sovereign Prerogative: The Supreme Court and the Quest for Law*, "The Price of Federalism," 289, 304.

The judgment of the majority of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

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**IN THE  
SUPREME COURT OF THE UNITED STATES.**

**OCTOBER TERM, 1965.**

**No. 545.**

**JOSEPH E. SEAGRAM & SONS, INC., et al.,  
Appellants,  
v.  
DONALD S. HOSTETTER, ETC., et al.,  
Appellees.**

**On Appeal from the Court of Appeals of the  
State of New York.**

**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE  
and  
BRIEF OF WINE AND SPIRITS WHOLESALERS  
OF AMERICA, INC. AS AMICUS CURIAE,  
URGING REVERSAL.**

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JOSEPH E. SEAGRAM & SONS, INC., et al.,  
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DONALD S. HOSTETTER, ETC., et al.,  
Appellees.

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On Appeal from the Court of Appeals of the  
State of New York.

---

**MOTION FOR LEAVE TO FILE BRIEF  
AMICUS CURIAE.**

---

Wine and Spirits Wholesalers of America, Inc., respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the appeal herein, urging reversal of the judgment below. Consent to the filing of the brief has been obtained from counsel for the appellants but a request for the appellees' consent has been denied.

Wine and Spirits Wholesalers of America, Inc. (W. S. W. A.), is a trade association of wholesalers of wine and

distilled spirits. It has 686 members distributing alcoholic beverages at wholesale to retailers in all the states of the United States (including New York) and the District of Columbia, with the exception of the seventeen monopoly states that engage in the liquor business. The number of W. S. W. A. members located in each license (non-monopoly) state is set out in Appendix A of the attached brief. (The brief *amicus curiae* is not filed on behalf of W. S. W. A. members located in the States of Kansas and New Jersey.) The members of W. S. W. A. purchase alcoholic beverages from distillers, importers, and other suppliers and brand owners and sell and distribute the same to the retailers in the various states.

W. S. W. A. and its members have a vital interest in the issues presented to the Court in this case. They are among those whose activities are directly affected and regulated by the New York statute in question. By its decision, the Court of Appeals of New York has held that the legislature of the State of New York has the constitutional power to require all brand owners (distillers, importers and other suppliers) to sell to wholesalers in New York (including W. S. W. A. members) at the lowest prices they sell to any wholesaler in the United States (who may be a W. S. W. A. member) and to require "related" wholesalers in New York State (including W. S. W. A. members) to sell brands to retailers at the lowest prices that the same items are sold to retailers by any "related" wholesaler in the United States (who may be a W. S. W. A. member).<sup>1</sup>

Thus, if the decision below be affirmed, the maximum price charged by any wholesaler in New York for any

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<sup>1</sup> A "related wholesaler" is defined as a wholesaler doing a substantial part of its business in the same brand or in the brands of the same brand owner (Section 9 (f), Ch. 531, 1964 New York Session Laws).

brand will be determined by the lowest price charged by a "related" wholesaler anywhere in the United States for the same item, even though such price is unrelated to a reasonable price under conditions in New York, even though such a price may be unreasonably low, and even though such a price may be lower than the actual cost of the item to the New York wholesaler. Moreover, the distillers, importers, brand owners and other suppliers will have to sell to wholesalers in New York at the lowest prices they sell to any wholesaler in the United States, regardless of the circumstances of such extra-territorial low-price sale. Such suppliers will then be unable to reduce prices to wholesalers in other states, or to give discounts or other allowances, without giving the same low prices (reflecting the same discounts, allowances, etc.) to wholesalers in New York regardless of the reason for such low prices.

The inevitable and necessary effect will be an economic restriction upon the ability of wholesalers in other states to secure from suppliers price reductions, discounts, allowances and other inducements necessary to meet competition in their localities. Among those so affected will be members of W. S. W. A. doing business in states other than New York, including "related" W. S. W. A. wholesalers seeking to meet local competition. This is a matter of utmost and continuing concern to W. S. W. A. members;<sup>2</sup> for some, if the New York legislation is sustained, the inexorable result will be to drive them out of business.

The grave implications stemming from this legislation have motivated W. S. W. A. to seek leave to appear be-

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<sup>2</sup> These problems are of more than recent concern to the members of W. S. W. A. In 1961, for example, the W. S. W. A. membership adopted a resolution condemning any state requirement that a distiller sell within a state at a price no higher than the lowest price at which he sells his product to any buyer anywhere.

fore this Court as *amicus curiae* and to present the economic and constitutional problems from a broader standpoint than the appellants herein can command. To that end, the requested leave to file the attached brief should be granted.

Respectfully submitted,

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**BRIEF OF WINE AND SPIRITS WHOLESALERS OF  
AMERICA, INC., AS AMICUS CURIAE,  
URGING REVERSAL.**

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**ARGUMENT.**

**Introduction.**

*Amicus Curiae* takes no position on the power of the State of New York to regulate, in a reasonable way, maximum prices in the sale of alcoholic beverages in the State of New York or on the validity of various incidental

provisions of Chapter 531 of 1964 New York Session Laws, all of which are ably presented in the brief of Appellants. *Amicus Curiae* is primarily interested in the inevitable economic impact on wholesalers in other states of the provisions of Paragraphs (d) and (f) of Section 9 of Chapter 531 establishing an arbitrary and capricious extra-territorial standard for determining prices to wholesalers and to retailers, and *Amicus Curiae* is gravely interested in the constitutional implications for all members of the alcoholic beverage industry of a decision sustaining the validity of Section 9, Chapter 531.

### Questions Involved.

The basic question involved is whether citizens engaged in manufacturing and distributing alcoholic beverages are deprived, by the Twenty-First Amendment to the Constitution of the United States, of any constitutional protection against arbitrary and capricious imposition by individual states in matters unrelated to temperance or other proper liquor control considerations. May a state deprive a citizen in the operation of his business, of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States because he happens to be engaged in the alcoholic beverage business? May a state impose arbitrary extra-territorial burdens on interstate commerce for the economic benefit of its own citizens simply because the commerce in question happens to involve the transportation and sale of distilled spirits? Does the Twenty-First Amendment to the United States Constitution, prohibiting the transportation or importation of alcoholic beverages into a state for use or delivery therein in violation of the laws of the state, strip the industry of all constitutional protections and permit a state to enforce arbitrary, capricious and confiscatory impositions having nothing to do with protecting the state or its people from the influx of liquor from other states,

having nothing to do with the proper control of the social aspects of liquor, and having nothing to do with the proper exercise of the police power of the state? Does the Twenty-First Amendment allow a state to impose arbitrary burdens on commerce in other states, free of all constitutional restraints simply because the commerce happens to involve alcoholic beverages?

### **The Erroneous Premise of the Decision Below.**

The critical—and erroneous—predicate of the decision below is that “it is too late today to suggest that the rights of those who choose to engage in it (the liquor business) are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics, or furniture” (R. 346). Whatever conditions are imposed on the liquor business in New York, whatever the impact upon commerce in other states, the liquor industry is said to lack any constitutional base for protest. Support for such an astonishing outlawry of the constitutional rights of the liquor industry is thought to stem from this Court’s decisions in **State Board of Equalization v. Young’s Market Co.**, 299 U. S. 59 (1936); **Mahoney v. Joseph Triner Corp.**, 304 U. S. 401 (1938); **Indianapolis Brewing Co. v. Liquor Control Comm’n**, 305 U. S. 391 (1939); and **Joseph S. Finch & Co. v. McKittrick**, 305 U. S. 395 (1939).

Those decisions, rendered in the years immediately following adoption of the Twenty-First Amendment, are said to stand for the general proposition that by virtue of the provisions of that Amendment “a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.” **Hostetter v. Idlewild Liquor Corp.**, 377 U. S. 324, 330 (1964). But, as this Court was careful to note in the **Idlewild** case, 377 U. S. at 331-332, to conclude from this



line of decisions "that the Twenty-First Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. . . . Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."<sup>1</sup>

Indeed, Mr. Justice Brandeis, writing for the Court in the key **Young's Market** case, 299 U. S. at 64, made it plain that the ruling that the Twenty-First Amendment removed the normal Commerce Clause restrictions on a state's power to regulate the liquor industry did not "involve a declaration that the Amendment has, in respect to liquor, freed the states from all restrictions upon the police power to be found in other provisions of the Constitution." All that was there decided, all that the Twenty-First Amendment was designed to achieve, was that states are constitutionally free to forbid any and all importations of liquor for use therein, either absolutely or upon such conditions as they see fit to impose.

Removing the ordinary Commerce Clause restrictions on state power with respect to liquor importation is something quite different and significantly more limited than the premise of the court below that those who engage in the liquor trade are on a lower constitutional or legal level than those who deal in bicycles, cosmetics or furniture. While the person engaged in the liquor

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<sup>1</sup> Compare **North American Co. v. S. E. C.**, 327 U. S. 686, 704-705 (1946), where, in commenting on the plenary and unlimited power of Congress under the Commerce Clause, this Court noted: "This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as § 9 of Article I and the Bill of Rights. But as far as the Commerce Clause alone is concerned Congress has plenary power . . ."

business may not be able to protest that a state ban on imports violates the Commerce Clause, this Court has consistently recognized his parity with other citizens to protest state infringements on other constitutional and legal rights. He can, for example, assert a constitutional right to ship liquor through a state for delivery and use in a national park within that state, **Collins v. Yosemite Park Co.**, 304 U. S. 518 (1938), or for delivery and use in a foreign country, **Hostetter v. Idlewild Liquor Corp.**, *supra*. See also **Carter v. Virginia**, 321 U. S. 131, 137 (1944); **Johnson v. Yellow Cab Co.**, 321 U. S. 383 (1944). And the liquor merchant has unquestioned standing to protest, either in due process or equal protection terms, any state regulatory scheme that allegedly takes away his property unfairly or that allegedly establishes an arbitrary and unreasonable classification. See, e. g., **Old Dearborn Distributing Co. v. Seagram-Distillers Corp.**, 299 U. S. 183 (1936).<sup>2</sup>

In other words, the states in controlling the trade and use of liquor within their boundaries still "cannot play favorites . . . without rhyme or reason" and cannot create "irrational discrimination as between persons or groups of persons in the incidence of a [liquor control] law." **Goesaert v. Cleary**, 335 U. S. 464, 466 (1948).<sup>3</sup>

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<sup>2</sup> The **Old Dearborn** case was decided about a month after the **Young's Market** case. The Court there unanimously held that the Illinois Fair Trade Act was constitutional. In so doing, the Court rejected on the merits the claims of the protesting liquor distributor that the Act violated the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. But not one word was said which would indicate that the Twenty-First Amendment removed liquor distributors from the recognized scope of those Clauses.

<sup>3</sup> A discrimination against liquor imports into a state that is permissible under the terms of the Twenty-First Amendment is not to be condemned under the Equal Protection Clause. **Mahoney v. Joseph Triner Corp.** (*supra*). But the Twenty-First Amendment has never been construed by this Court to justify all forms of irrational discrimination in the control of

Just as a state may not limit liquor licenses to those of the Protestant faith or to those who belong to the Democratic Party, so too a state may not seize the property of a liquor dealer and dispose of it without following the dictates of due process and just compensation requirements. As was held in **Hornsby v. Allen**, 326 F. 2d 605, 609 (5th Cir. 1964),

“It is firmly established, of course, that the state has the right to regulate or prohibit traffic in intoxicating liquor in the valid exercise of its police power . . . but this is something quite different from a right to act arbitrarily or capriciously. Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion. . . .

“Next, we note that states do not escape the operation of the 14th Amendment in dealing with intoxicating beverages by reason of the 21st Amendment. Section 2 of that Amendment deals with the transportation or importation of liquors into a state or territory. Thus, although a state may, under the 21st Amendment, discriminate against imports of intoxicating beverages, . . . the Amendment does not confer any other powers.”

Liquor merchants, in short, are not outside the constitutional pale.

And so the instant case must be approached not as a sterile exercise in denouncing the constitutional rights of low-grade citizens, but as an inquiry into the constitutional power of the State of New York to regulate, if not

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liquor distribution. If the discrimination is not rationally related to the delivery and use of liquor within a state, it remains subject to the principles of the Equal Protection Clause. That is the plain teaching of **Goesaert v. Cleary** (supra) (holding reasonable a Michigan classification of certain females who may work as barmaids in liquor taverns).

destroy, the commerce in liquor within and among the other states of the Union.<sup>4</sup> If it be true that the New York legislation in question goes beyond, or lacks a rational relationship with, New York's power under the Twenty-First Amendment to prohibit or regulate the distribution and use of liquor within its borders, other constitutional considerations come into sharp focus. To hold that the Twenty-First Amendment in such circumstances has "repealed" the Commerce Clause, the Due Process Clause, the Equal Protection Clause, the Export-Import Clause or any other constitutional provision would be, in the words of the Court in the *Idlewild* decision, 377 U. S. at 332, "patently bizarre" and "demonstrably incorrect."<sup>5</sup> See *Department of Revenue v. James Beam Co.*, 377 U. S. 341, 345-346 (1964).

It is the position of all those protesting the decision below, including the *Amicus Curiae*, that New York has here overstepped the bounds of its authority under its police power and under the Twenty-First Amendment and that it has created unreasonable burdens upon the nation-wide liquor industry that are forbidden by the Commerce Clause and the Due Process Clause, among others. These are claims, of a constitutional nature, that liquor dealers are as entitled to make as any other citizen, for the rights at stake are rights that belong to all persons covered by the Constitution—be they bicycle makers or liquor distributors.

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<sup>4</sup> "The freedom given to states under the Twenty-first Amendment was not intended as a license to legislate against other states." 38 Temple L. Q. 227, 229 (1965). See also 55 Yale Law Journal 815 (1946), and Hamilton, *Price and Price Policies*, 425-426 (1938).

<sup>5</sup> As the *Idlewild* opinion noted, 377 U. S. at 332, one effect of such a "repeal" would leave Congress bereft of regulatory power over interstate or foreign commerce in intoxicating liquor. No such "repeal" has ever been recognized. See *Jame-son & Co. v. Morgenthau*, 307 U. S. 171, 172-173 (1939); *United States v. Frankfort Distilleries*, 324 U. S. 293 (1945).

The alcoholic beverages industry has come a long way since the days of prohibition and the Twenty-First Amendment, which was designed to spare the drier states from an unwanted influx of liquor. The industry now is one of the largest in the nation. It directly employs some 1,676,000 persons—indirectly the number is enormous. Total retail sales in the business amount to some \$13,940,000,000 per year. It is a tremendous user of agricultural and industrial products. It is the largest taxpayer in the nation. In 1964, license fees paid by the alcoholic beverage industry amounted to \$102,189,397 and sales taxes paid to the state governments amounted to \$315,868,000. Excise taxes paid to federal, state and local governments totaled \$5,481,069,384. In addition, the industry, corporations and individuals, contributed enormous sums to the income tax and other federal and state revenues.

On the other hand, the industry has had to contend with more trade barriers and state and local impositions and exactions than any other industry. These barriers and obstacles are encouraged by the widely accepted attitude that the industry and the citizens engaged in it have been deprived of all constitutional protection by the Twenty-First Amendment, and that the members of the industry are second class citizens subject to unreasonable, discriminatory and arbitrary treatment. It is submitted that the Twenty-First Amendment was never intended to have this effect and that this Court has never held that it has this effect.

It is submitted that the alcoholic beverage industry is such an important and integral part of the economic life of the nation, and such an important contributor to the national and state revenues, that it is most important that this Court make it clear that the industry and the citizens engaged in it are entitled to all constitutional safeguards and that the state is justified in exercising its

police power only to the extent reasonably necessary to regulate the importation, transportation, sale and use of its products in fostering temperance and other desirable social conditions.

### POINT I.

Section 9 (f) of Chapter 531, 1964 New York Session Laws, requiring "related" wholesalers in New York to sell brands of distilled spirits to retailers at prices no higher than the lowest prices at which the same items are sold to a retailer by any "related" wholesaler in any state in the United States, including the District of Columbia, violates the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States and imposes an undue burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

#### The New York Law.

A wholesaler in New York may sell only at prices set out in a schedule filed by the wholesaler with the State Liquor Authority. No discounts or other inducements are permitted except a quantity discount of two percent (2%). The schedules are filed before the tenth of the month, and the prices therein become effective the first day of the following month (Section 101-b, New York Alcoholic Beverage Control Law 1942).

Paragraph (f) of Section 9, Chapter 531, 1964 New York Session Laws, requires a verified affirmation to be filed with respect to a schedule filed by a related person (wholesaler) affirming that the bottle and case prices of liquor to retailers set forth in the schedule are no higher than the lowest prices at which such items were sold by any related person to a retailer anywhere in any state of the United States or in the District of Columbia at any time during the calendar month immediately preceding

the month in which said schedule is filed. The affirmation must be verified by the brand owner or a wholesaler designated as agent by the brand owner. "Related person" is defined to mean, among other things, any person "the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent" (Section 101-b (3) (f), Alcoholic Beverage Control Law). Subsection (i) of Section 9 provides that, in determining lowest price, appropriate reductions must be made to reflect all discounts, allowances and other inducements. There is no restriction on sales by wholesalers below cost. No regulation of the Liquor Authority of New York defines "substantial" as set out in the statute.

Under Paragraph (f) of Section 9, therefore, any "related" New York wholesaler is required to sell to retailers at the lowest price the brand was sold by any other related person to any retailer anywhere in the United States. In other words, Paragraph (f) imposes a maximum price on "related" wholesalers in New York. The standard for determining this maximum price is the lowest price in any sale by any related person to any retailer anywhere in the United States.

The brief of Appellants points out a number of reasons why it is impossible to comply with Section 9 (f). These reasons include the following:

- 1—It is impossible to identify "related" persons.
- 2—It is impossible to determine "lowest price."
- 3—It is impossible to know the prices at which related persons sell throughout the country.
- 4—The clerical and reporting task involved is staggering.

All of these reasons are convincing. It is difficult to understand how a law with which it is impossible to comply,



and which patently cannot be enforced, can possibly be constitutional, especially as it carries severe penalties and criminal sanctions.

There is the question of the meaning of "substantial" in the definition of "related persons." It obviously means something different from "principal." Presumably "principal" involves more than half of the person's business. Substantial must mean something less than half; whether it is 5%, 10%, 25% or more is not spelled out in the statute. Substantial is defined in Webster's New International Dictionary, Second Edition, page 2514 (1952), as "considerable in amount, value or the like," "large". Five percent (5%) of sales of a wholesaler having \$3,000,000 sales per year would be \$150,000 of sales of a brand or of the brands of one brand owner. Ten percent (10%) would be \$300,000, and twenty percent (20%) would be \$600,000. Where a wholesaler does \$10,000,000 of business a year, three percent (3%) would be \$300,000. It would be most difficult to draw a line.

It seems evident, however, that every wholesaler would be a "related person" with respect to most of the brands he sells except private brands and brands not sold both in New York and in other states. Unquestionably every New York wholesaler is a "related" person with respect to some brand or to the brands of some brand owners. He must be doing a substantial part of his business in some brand or in the brands of some brand owner or he would presumably not be in business unless he dealt exclusively in private brands. This would seem to apply also to wholesalers in other states. Furthermore, there must be "related person" wholesalers in all other states with respect to all important brands or brands of important brand owners who sell both in New York and in other states. So, whether or not they can be clearly identified and whether or not their prices can be known, there are wholesalers in every state (except the monopoly states)

whose prices must be considered in determining the maximum price of a brand in New York State.

Among these far flung "related" wholesalers must be found one whose price is the lowest in a particular month or some time during that month. The lowest price of this wholesaler (even if granted only in one sale) becomes the maximum allowable price for the brand in question in New York State for all wholesalers who are "related persons" with respect to such brand or the brands of the brand owner selling such brand. Since this lowest price becomes the maximum price for all related wholesalers in New York by force of law, it must in practice become the maximum price for all non-related wholesalers by force of economic law. So for all brands sold by any important brand owner doing business in New York State and in other states, Section 9 (f) in practice imposes a maximum price for all wholesalers. Only private brands, brands not sold in other states, or unimportant brands of brand owners whose brands would not constitute a substantial part of the business of any New York wholesaler, would be free of the maximum price regulation of Section 9 (f).

In addition to the difficulties of compliance with the law and the difficulties of enforcement mentioned above, there are clear constitutional defects in regard to the standard imposed by Paragraph (f) of Section 9 in determining maximum prices:

**1. The lowest price of any related wholesaler to any retailer in any state has no relation to conditions in New York.**

Assuming that the lowest price in some other state reflects a fair price under the conditions in that state, it obviously has no relation to conditions in New York. Costs of operation, competitive conditions, demand and many other factors that affect price may be, and usually

will be, completely different in the locality where the lowest price occurs. The appellants have shown that costs of operations differ substantially from area to area (R. 247). The standard imposed is not designed to determine reasonable prices, but only the lowest prices.

**2. The lowest price of any related wholesaler to any retailer in any state will not be, in all probability, a reasonable price even in the locality where the lowest-price sale is made. There is no assurance at all that it is. It happens that in fact it very often is not reasonable.**

Low prices occur occasionally in any area where prices are not controlled by law. Competition usually sees to this. (The fact that cut prices may become unreasonably low was the only justification for minimum price regulation that prevailed in New York prior to 1964.) Wholesalers generally are independent business men, and rugged competitors. In some states it may be unlawful for suppliers even to suggest to wholesalers the resale prices to retailers (Missouri: See Section 416.010-416.080, R. S. Mo. 1959; Texas—See Section 1632, Penal Code). Many states have no price controls (See Appendix B attached). This includes even states that have price posting laws but no control over the level of prices posted (Appendix B attached).

Paragraph (f) of Section 9, therefore, determines maximum prices to retailers in New York State by designating as the standard the lowest competitive prices in the United States under any conditions.

That this is the effect of Section 9 of Chapter 531, is illustrated by the situation in Oklahoma. Under state law of Oklahoma, distillers must sell to any and all wholesalers in the state. Oklahoma wholesalers are completely independent of, and beyond any influence from, brand

owners. Oklahoma has no laws regulating minimum or maximum prices. But Oklahoma does have a price posting law (Appendix B). All prices of suppliers to wholesalers in Oklahoma are posted. Prices of all wholesalers to retailers in Oklahoma are posted. All prices are public information. As a result, all wholesalers must necessarily meet the lowest posted prices and post the same low prices if they wish to do any business. Under such circumstances prices tend to be uniform at the lowest level. Here are the prices posted in Oklahoma on December 16, 1965:

**OKLAHOMA WHOLESALE COSTS AND PRICES**  
(Per Case of Fifths).

**December 16, 1965.**

Mfg.	Brand	F. O. B. Cost	Frt. Cost*	State Tax	Laid in Cost**	Price to Re- taller***	Whole- sale Mark Up	Whole- sale Mark Up %
National	Old Crow .....	\$36.17	\$.60	\$5.76	\$42.53	\$41.80	\$-.73	loss
Walker	Ten High .....	30.15	.60	5.76	36.51	37.23	+.72	2%
Seagrams	7 Crown .....	34.00	.60	5.76	40.36	41.32	+.96	2.4%
Seagrams	V O .....	47.87	.60	5.76	54.23	55.19	+.96	1.8%
Beam	4 yr. ....	33.98	.60	5.76	40.34	41.31	+.97	2.4%
Brown- Forman	Early Times ..	39.30	.60	5.76	45.66	46.55	+.89	1.9%
Jack Dantels	Green Label ..	43.74	.60	5.76	50.10	51.04	+.94	1.9%
Barton	Kentucky Gentleman ....	33.20	.60	5.76	39.56	40.53	+.97	2.4%
Glenmore	Yellowstone ...	36.50	.60	5.76	42.86	43.82	+.96	2.2%
Schenley	Ancient Age ..	37.30	.60	5.76	43.66	43.65	-.01	loss
Melrose	Charter 7 .....	46.58	.60	5.76	52.94	53.03	+.09	0.17%

\* Most items shipped from Kentucky to Oklahoma. Average shipping cost is \$0.60 a case.

\*\* Wholesalers laid-in-cost is the F. O. B. price plus State tax and freight.

\*\*\* Posted Price to Retailer.

(See affidavit of Claud Thompson in Appendix C attached.)

Some of the well known brands of liquor are being sold by the wholesalers in Oklahoma below the actual laid-in cost to the wholesaler. None of the brands is being sold at more than a 2.5% markup. This condition has been chronic in Oklahoma. Wholesalers are losing money on every sale they make in Oklahoma, when their expenses and overhead are considered. Some wholesalers in that state will surely go out of business if they continue very long at this rate without replenishment of capital by their proprietors. Unless the brands being sold in Oklahoma are being sold at even lower prices elsewhere, the Oklahoma prices in December would be the New York prices in February. Since operating expenses in New York are substantially higher, the New York wholesalers would be losing even more money than the Oklahoma wholesalers. Therefore, Section 9 (f) in fact imposes a confiscatory standard for determining prices to retailers in New York. The equivalent prices in New York in December were as follows:

**NEW YORK WHOLESALE COSTS AND PRICES**  
(Per Case of Fifts).

December, 1965.									
		F. O. B.	Frt.	State	Label	Laid in	Price	Whole-	Whole-
	Brand	Cost*	Cost* (Incl.)	Tax	Use Fee	Cost**	to Re-tailer***	sale Mark Up	sale Mark Up %
	Old Crow .....	\$37.84	.35	\$3.60	\$1.80	\$43.24	\$45.19	\$1.95	4.5%
	Ten High .....	30.34	.35	3.60	1.80	36.09	40.91	4.82	13.4%
	7 Crown .....	34.00	.35	3.60	1.80	39.75	45.19	5.44	13.7%
	V. O. ....	47.17	.48	3.60	1.80	53.05	60.14	7.09	13.4%
	4 yr. ....	33.98	.58	3.60	1.80	39.96	45.19	5.23	13.1%
	Early Times ..	36.98	.58	3.60	1.80	42.96	47.30	4.34	10.1%
	Green Label ..	(Not Sold in New York State)							
	Kentucky	32.65	.58	3.60	1.80	38.63	40.06	1.43	3.7%
	Gentleman ....	36.50	.58	3.60	1.80	42.48	48.93	6.45	15.2%
	Yellowstone ..	37.78	(Incl.)*	3.60	1.80	43.18	47.03	3.85	8.9%
	Ancient Age ...								

\* Freight included under F. O. B. cost in case of Old Crow.

\*\* Wholesaler's laid-in cost is the F. O. B. price plus freight, state tax and label use fee.

\*\*\* Posted price to retailer.

(See affidavit of Morris Alprin in Appendix D attached.)



**3—Section 9 delegates to unknown persons power to determine maximum prices to retailers in New York State at confiscatory low levels.**

A wholesaler in any state not operating under price controls, may, because of competitive conditions, financial difficulties, or for any other reason, make individual sales of selected brands at prices below cost. An out-state wholesaler, deliberately intending to influence New York prices, would more than likely take appropriate steps to see that the prices were known to the authorities there. These prices would then become the prices which the brand owners would have to affirm as the maximum prices in New York State. Furthermore, such a wholesaler need make only one sale of one case of a brand. The price of that sale would be the highest price for all sales of that brand in New York for an entire month.

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In summary, it is clear that Section 9 (f), Chapter 531, is not designed to insure reasonable maximum prices for the sale of liquor to retailers in New York State. It is designed for all practical purposes to insure that such prices will be not only unreasonable, but actually confiscatory. It should be noted that, while sales below cost are prohibited in the case of retailers (Section 10, Chapter 531), no such protection is afforded wholesalers. This is the means adopted by the legislature of New York supposedly to forestall possible monopolistic and anticompetitive practices designed to frustrate the elimination of price discrimination against New York consumers as compared to consumers in other states, the necessity of which was declared a matter of legislative determination (Section 8, Chapter 531). Neither temperance nor any other recognized proper subject of liquor control is here involved.

*Amicus Curiae* is mindful that Courts are reluctant to upset state legislation on substantive due process grounds

except in cases of clear violation. In this case, however, the New York Courts simply held the liquor industry to be without constitutional protection under any circumstances. For example, Judge Bergan in his opinion for the New York Court of Appeals, states (R. 346):

“If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of [the] opinion they are not economically impossible and that the effect of the 1964 statute will be to **reduce liquor profits** and pass the benefit of some of them on to New York consumers” (emphasis added).

Having arrived at that legal conclusion, there was no necessity to evaluate the economic impact of this law on the liquor industry. The decision is simply based on the idea that persons engaged in the business of selling alcoholic beverages are stripped of all constitutional protection and are subject to whatever abuse the state legislature wishes to hand out to them even to the extent of imposing impossible conditions. Confirmation of such a legal principle by this Court would constitute a severe shock to the entire industry wherever located in the United States. It would sanction the principle that persons in the liquor industry are subject to injuries and unjust imposition from which the Constitution is designed to protect United States citizens and even other persons. We submit that this principle should be repudiated. It is true that states are allowed to do many things in regulating the distribution of liquor in the name of temperance and liquor control; but surely when legislation is not even claimed to be for such purposes, this Court should not permit citizens to be deprived of their constitutional rights.

*Amicus Curiae* suggests, therefore, that the present case squarely presents the question of whether the liquor busi-

ness (like other businesses) is protected by the due process clause of the Fourteenth Amendment. We submit that historically it has received such protection, and that there is nothing in the Twenty-First Amendment which repeals the due process clause. Moreover, a decision affirming the constitutionality of Section 9 (f) would place all wholesalers in the country in jeopardy, because such a holding would be a "green light" to state legislatures to regulate the liquor industry completely without concern about the constitutional rights of those engaged in the business.

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*Amicus Curiae* also suggests that Section 9 (f) creates an undue burden on interstate commerce in violation of the commerce clause of the United States Constitution (Art. I, Sec. 8, Cl. 3) for the reasons set forth under Point II (*infra*).

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The Court of Appeals made a completely untenable argument (R. 347) that the experience of distillers in complying with the somewhat similar price warranty required by liquor monopoly states, demonstrates that the price regulation in the New York statute "is neither impossible of compliance nor unreasonable." This argument is unsound. While monopoly states do, for the most part, as a condition of purchase of liquor, demand that brand owners represent that the prices they charge monopoly states are no higher than prices charged other buyers, they make such demand, not as a matter of legislative power, but rather as a matter of bargaining, as buyers in the market place who happen to have exclusive control of the market in the state. As large volume buyers they can make demands that an entrepreneur cannot successfully make. Suppliers also have the privilege of offering monopoly states only brands distinguished in name, proof

or other characteristics, from brands offered in free enterprise states.

Whatever the burdens assumed by a distiller in voluntarily entering into such a contract with a liquor monopoly state and agreeing to charge the lowest price charged in other states, they are in no way comparable to the difficulties faced by a brand owner, seeking to comply with New York law, in determining the lowest price in the nation charged by any **wholesaler to any retailer**. The wholesalers' difficulties find no counterpart whatever in the liquor monopoly states, which deal only with distillers and not with wholesalers. Thus the experience in the administration of the contracts entered into by the liquor monopoly states affords no precedent whatever for assuming that the brand owners and wholesalers would not have the undue difficulties herein detailed.

## POINT II.

Section 9 (d) of Chapter 531, 1934 Session Laws, requiring brand owners to sell liquor to wholesalers in New York at prices no higher than the lowest prices at which such item was sold to any wholesaler anywhere in any state of the United States or the District of Columbia is unconstitutional as an undue burden on interstate commerce in violation of the Commerce Clause of the United States Constitution, Article 1, Section 8, Clause 3, and is in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

### The New York Law.

Section 101-b-3 (a) of the Alcoholic Beverage Control Law of the State of New York, as amended, requires a brand owner to file a schedule with the bottle and case price to wholesalers and provides that such brands shall not to be sold to wholesalers except at the prices and discounts shown on the schedule then in effect.

Section 9 (d) added a new paragraph to Section 101-b requiring the brand owner to file in connection with such schedule, a verified affirmation that the prices set forth in the schedule are no higher than the lowest prices at which such items are sold to any wholesaler anywhere in the United States at any time during the calendar month preceding the filing of the schedule. Paragraph (i) provides that, in determining the lowest price, consideration must be given to all discounts, allowances, and other inducements. Section 8 of Chapter 531 states that the restriction of Section 9 (d) was enacted to forestall possible monopolistic and anticompetitive practices designed to frustrate the elimination of price discrimination to the disadvantage of consumers in New York State.

Section 9 (d) therefore **is not designed to promote temperance nor any other recognized objective of proper liquor control.** It is designed simply to regulate maximum prices and secure lower prices for consumers in the State of New York. Section 9 (d) was not enacted to prohibit or regulate the "importation or transportation" of alcoholic beverages into the State of New York. It applies to all liquor whether manufactured and sold in New York or imported into the state. It determines the maximum price of brands sold to wholesalers in New York by reference to the lowest price paid by a wholesaler in any state to the brand owner or any "related" person.

#### **The Effect of Section 9 (d).**

The standard established by Section 9 (d) for determining the highest price to be charged a wholesaler in New York is an extra-territorial one—the lowest price charged any wholesaler in any state by the brand owner or related person.

Section 9 (d) is designed to secure lower prices for consumers in New York. The standard is the lowest price charged any wholesaler in any state in the union without

reference to the reasonableness of the lowest price, the condition of the market where the lowest price is charged or the reasonableness of the lowest price under the market conditions in New York. The maximum price standard provided by paragraph (d) is not designed to provide a reasonable price, but to secure the lowest price even though it might be an unreasonably low price. In this aspect, paragraph (d) of Section 9 suffers from the same constitutional defect as paragraph (f); it is an arbitrary, capricious method of determining maximum prices, not for the purpose of setting reasonable prices, but to secure low prices for consumers in New York, and is therefore in violation of the Fourteenth Amendment.

The only distinction between paragraph (f) and paragraph (d) is that in the case of paragraph (d) the brand owner might be supposed to be able to determine the lowest price charged wholesalers in other states. Even so, this does not save the legislation because this extra-territorial standard in turn constitutes an undue burden on interstate commerce.

To save Section 9, Paragraph (d) from the objection that it establishes an unreasonable standard for prices charged wholesalers in New York, it must be presumed that the brand owner will exercise his discretion to determine his selling price by charging New York wholesalers a reasonable price. In order so to exercise his freedom in this area, however, the brand owner must charge all wholesalers in all other states no lower prices than he charges wholesalers in New York. His freedom, therefore, to make sales at reasonable prices in other states, or to meet competition, or to lower prices for any legitimate reason, is restricted by the price charged in New York. Section 9 (d) therefore is either an unreasonable standard for determining maximum prices in New York or it is an unwarranted interference with the freedom of a brand owner to determine his prices in **other states**. Since New

York is such an important market, it is quite likely that in many cases the actual result of this legislation will be to restrict the right of the brand owner to charge prices he considers desirable under all the circumstances in other states.

This legislation, therefore, will impose an undue burden on interstate commerce in the following respects:

1. A brand owner will be deprived of freedom to grant price reductions, discounts, allowances, and other inducements to wholesalers in other states in order to:

a) meet competition from other brand owners in other markets;

b) to introduce new brands in other markets;

c) to stimulate demand for his brands in other markets;

d) to meet competition from private or local brands in other states;

e) to meet competition from brand owners whose brands are not sold in New York;

f) to enable his wholesalers in other markets to meet competition in their localities from private brands, other competitive brands and brands not sold in New York.

The only way a supplier would be free to meet such price conditions in other states would be to suffer a penalty by being forced to charge a lower price in New York. This is, in fact, the expressed purpose of the New York law—to secure an economic benefit for New York consumers by imposing maximum prices determined by lowest prices in any state regardless of the reasonableness of such prices in the light of all the circumstances in New York.

This type of legislation would not, of course, be constitutional with respect to persons selling any other type of



product, such as milk, automobiles, gasoline, tobacco, etc. (See **Baldwin v. G. A. F. Seelig**, 294 U. S. 511 (1935).) It should not be held constitutional here.

The same basic principle is at stake here as in the case of paragraph (f) of Section 9. Are the persons engaged in selling alcoholic beverages stripped of all protection of the Constitution from state laws imposing undue burdens on interstate commerce and on commerce in other states and from burdens that would violate the commerce clause if imposed on persons engaged in selling other products? This certainly was not the purpose of the Twenty-First Amendment.

Whatever may have been the attitude toward the liquor industry shortly after Repeal, a judicial attitude exemplified by the majority opinion of the New York Court of Appeals is completely inadequate to the problem of dealing with the complex affairs of a major industry, an industry that is the largest contributor to the national Treasury and involves the livelihood of several million citizens. There is no plausible justification for depriving citizens engaged in this industry of the protection of the Constitution. This is a strange attitude built upon an unjustified universal interpretation of terms designed for the limited purpose of enabling dry states to prevent the importation of liquor. On this flimsy base has developed a judicial climate that finds American citizens subject to deprivation of property without due process of law and subject to discriminatory and capricious treatment by various states in the conduct of their interstate business. We respectfully submit that this cloud on the constitutional rights of millions of American citizens and on the freedom of an important industry to engage in interstate commerce free of arbitrary state restrictions—especially those of an extra-territorial character—should be dispelled.

The very purpose of the commerce clause was to create an area of free trade among the several states (**McLeod v.**

**J. E. Dilworth**, 322 U. S. 327 (1944)), to prohibit the erection of trade barriers between the states (**General Motors Corporation v. Washington**, 377 U. S. 436 (1964)) and to ban devices by which one state gives economic advantages to its citizens at the expense of citizens of sister states (**Baldwin v. G. A. F. Seelig** (supra)).

Yet the obvious and necessary effect of Section 9, Chap. 531, 1964 New York Session Laws is **directly** to burden commerce in intoxicants between other states such as Kentucky and Oklahoma. Under present conditions, a national brand owner must either raise his prices for whiskey distilled in Kentucky and sold to Oklahoma wholesalers, and force them thereby to raise their resale prices to retailers, or he must stop selling in Oklahoma, or he must reduce his prices to New York wholesalers to unreasonable levels. This is clearly the type of interference with interstate commerce that the Commerce Clause of the Constitution was designed to prevent. In other states also, especially where free trade has allowed competitive forces to operate to the fullest extent, there is obvious danger of dislocation of commerce. Amicus Curiae asserts that New York State simply does not have the right to seek special advantages for its residents by a program which must burden the liquor business in other states. Just as the Commerce Clause forbids the states from controlling the flow of liquor into a federal enclave or foreign country at the end of an interstate movement (see **Hostetter et al. v. Idlewild** (supra)), so too the Commerce Clause forbids the states from interfering with the flow of liquor commerce **before** it arrives at the state in question. In other words, New York's power under the Twenty-First Amendment is concentrated at its own border, enabling it to control, eliminate or condition the importation of liquor for use and distribution in New York. But the Twenty-First Amendment does not and cannot authorize New York to interfere with the liquor commerce in or between other states—much of which commerce will never touch New York.

Sections 9 (d) and 9 (f) seek to control the price of alcoholic beverages in the State of New York on the basis of facts and conditions that exist outside of the State of New York, and the enforcement of the statute will have an inevitable effect on such foreign facts and conditions. *Amicus Curiae* suggests that the Twenty-First Amendment was not intended to give states this power over interstate or foreign commerce and that this Court so held in **Hostetter v. Idlewild** (supra). To the extent that **Board of Equalization v. Young's Market Co.** (supra) and the other cases decided by this Court in the early days of repeal (such as **Mahoney v. Triner** (supra), **Indianapolis Brewing Co. v. Commission** (supra) and **Joseph S. Finch Co. v. McKittrick** (supra)) can be interpreted to justify the type of legislation here under consideration, such cases seem to be in conflict with **Hostetter v. Idlewild** (supra), and should, *Amicus Curiae* respectfully submits, be restricted to eliminate any such unjustified interpretation of the Constitution. This Court should not permit the Twenty-First Amendment to be used as a pretext for a state to interfere with commerce in other states.

### CONCLUSION.

**The Fact That a State May Prohibit the Sale and Distribution of Alcoholic Beverages Entirely Does Not Give the State Power to Regulate Persons in the Industry Free of All Constitutional Restraint.**

In addition to the misinterpretation of the Twenty-First Amendment, the decision of the New York Court of Appeals results from an unjustified and illogical extension of the premise that the state has the power to prohibit the sale and distribution of alcoholic beverages absolutely. We would not, of course, deny this power to prohibit. But it does not follow that, therefore, the state can impose burdens and restrictions on persons engaged

in the business without constitutional restraint of any kind. Nevertheless, that false conclusion is the basic, underlying foundation of the decision of the New York Court of Appeals. Actually, there is no other logical basis upon which the decision can be affirmed. We wish to face this issue squarely.

We agree that a state can, in the exercise of its police power, enact any provision reasonably designed to achieve any proper objective of liquor control. Regulations, extending from outright prohibition to control provisions reasonably designed to restrain and regulate the immoderate or prohibited use of alcoholic beverages can be enacted by the states. This is a proper objective of the police power. If such a regulation incidentally injures the business of persons engaged in selling liquor, they must unfortunately endure this. The injury in such cases, however, is not the purpose of the state act, but rather an unfortunate result of a proper exercise of the police power to control the use of liquor.

But it does not follow that the states can ignore the constitutional rights of its citizens engaged in the legal distribution of such products and violate those rights by enactments that:

1. Are not part of a program to prohibit or control the sale or use of liquor for reasons of temperance or other recognized liquor control purposes.
2. Are not reasonably related to such a program, or are not likely to further such purposes.

The constitutional right against deprivation of property without due process, for instance, is a fundamental one. There is no justification for depriving a person of such right unnecessarily and arbitrarily. Only when protection of such right would prevent or unreasonably hamper the due exercise of the power of the state to protect the

health, safety or welfare of its people should such a property right be restricted, much less destroyed.

From the point of view of constitutional law, a liquor business can be distinguished from other businesses only by reason of the fact that the subject of this business is easily susceptible to abuse. All the power necessary to protect the community from the evils of abuse must be conceded the state. People invest their wealth and talents in such enterprises with this risk inherent in the investment. But this restriction on constitutional rights need not be condoned beyond the limit necessary to enable the state properly to discharge its function to protect the public safety, health and welfare. Why go beyond that need? Where it is not necessary to do so to protect the public interest, what consideration would justify abrogating such private rights?

There is no reason to treat persons in the liquor industry differently from persons in any other industry. Where the legislation involved is not enacted to control the use of liquor, the nature of the product involved does not distinguish the legislation from legislation governing any other business. Liquor, then, is like any other product—just another commercial item—such as tobacco, gasoline, cosmetics and so on. The state can undoubtedly control the use of tobacco, as in the case of minors. Conceivably, it might be able to prohibit its use entirely. But in enacting legislation regulating the price of tobacco to prevent high prices, it would hardly do to say that, since the state could prohibit its use, persons engaged in its sale could not properly rely upon the protection of the Constitution with respect to their property rights. The same might be said of gasoline. It is a potentially dangerous fuel, especially when used to drive an auto at extremely high speeds or recklessly. The state could probably regulate its sale and use for proper purposes. The Con-

gress could grant states power to control its importation. But, would that remove the gasoline business from the commerce clause protection with respect to regulations that had nothing to do with its use? Would it deprive persons in the business of constitutional protection?

Considered in this light, isn't the attitude evidenced in the opinion of the Court of Appeals an attitude directed toward the persons engaged in the business, rather than a legal conclusion based on sound constitutional principles applicable to the control of a vital industry deeply involved in the welfare and prosperity of our country?

We respectfully request the Court to clarify the Constitutional status of persons engaged in the alcoholic beverage industry, and to reverse the decision of the New York Court of Appeals.

Respectfully submitted,

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## APPENDIX A.

### Number of WSWA Members in Various States.

Alaska .....	3
Arizona .....	10
Arkansas .....	7
California (No.) .....	63
California (So.) .....	26
Colorado .....	8
Connecticut .....	20
Delaware .....	8
District of Columbia .....	10
Florida .....	32
Georgia .....	29
Hawaii-Guam .....	9
Illinois (Chicago) .....	10
Illinois (Downstate) .....	35
Indiana .....	20
*Kansas .....	26
Kentucky .....	23
Louisiana .....	37
Maryland .....	11
Massachusetts .....	23
Minnesota .....	9
Missouri .....	40
Nebraska .....	8
Nevada .....	14
*New Jersey .....	26
New Mexico .....	9
New York (Greater) .....	14
New York (Upper) .....	28
North Dakota .....	3
Oklahoma .....	14

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\* The brief *amicus curiae* is not filed on behalf of W. S. W. A. members located in Kansas and New Jersey.



Rhode Island .....	9
South Carolina .....	4
South Dakota .....	5
Tennessee .....	23
Texas .....	45
Wisconsin .....	23
Virgin Islands .....	2

## APPENDIX B.

### Outline of Laws of License (Non-Monopoly) States Relating to Prices of Alcoholic Beverages.

1. States not permitting "fair trade" contracts in alcoholic beverages:

#### **Alaska**

#### **Colorado**

**Missouri**—Wholesalers are required to post their prices to retailers, and to sell to all retailers at the posted prices. Limited quantity and prompt payment discounts are allowed (Sections 311.332-311.338, Rev. Stats. 1959).

#### **Nebraska**

#### **Nevada**

**Oklahoma**—Distillers and Wholesalers are required to post their prices, and to sell to all purchasers at the posted prices (Article III, Regulations, Alcoholic Beverage Control Board).

#### **Texas**

#### **District of Columbia**

2. States allowing voluntary "fair trade" contracts:

**Arizona**—General Voluntary "Fair Trade" (Sections 44-1421-44-1424, Ariz. Rev. Stats. 1956). Non-signers bound. **General Electric Co. v. Telco Supply, Inc.**, 325 P. 2d 394 (Ariz. Sup. Ct. 1958). It is unlawful for a distiller to require a wholesaler to give a discount to a retailer unless the distiller shall have given the discount to the wholesaler (Section 4-244, Ariz. Rev. Stats. 1956).

**Florida**—General Voluntary “Fair Trade” (Chap. 541, Fla. Stats. 1963). Non-signers not bound. **Miles Laboratories v. Eckerd**, 73 So. 2d 680 (Fla. Sup. Ct. 1954). Wholesalers must offer same discounts to all retailers buying similar quantities (Senate Bill 191, Laws 1963).

**Georgia**—General Voluntary “Fair Trade” (Act No. 853, Laws 1953). Non-signers not bound. **Cox v. General Electric Company**, 85 S. E. 2d 514 (Ga. Sup. Ct. 1955). Wholesalers are required to post prices and sell at posted price (Chap. 7, Alcohol Tax and Control Unit Regs.).

**Illinois**—General Voluntary “Fair Trade” (Senate Bill 598, Laws 1935, amended by House Bill 230, Laws 1941). Non-signers bound. **Kinsey Distilling Sales Co. v. Foremost Liquor Stores, Inc.**, 154 N. E. 2d 290 (Ill. Sup. Ct. 1958).

**Indiana**—General Voluntary “Fair Trade” (Chap. 17, Acts of 1937). Non-signers not bound. **Bissell Carpet Sweeper Co. v. Shane Co., Inc.**, 143 N. E. 2d 415 (Ind. Sup. Ct. 1957). Fair Trade contracts and minimum wholesale and retail prices under “Fair Trade” contracts must be filed with the Alcoholic Beverage Commission (Reg. No. 11 Alcoholic Beverage Commission). Price may be advertised if the brand is offered for sale under a filed “Fair Trade” Contract (Rule 18, Reg. No. 4, Alcoholic Beverage Commission). Price posting required; discounts to wholesalers must be approved; discounts to retailers forbidden (Reg. No. 10, Alcoholic Beverage Commission).

**Maryland**—General Voluntary “Fair Trade” (Sections 102-110, Art. 83, Code, 1957). Non-signers bound. **Home Utilities v. Revere Copper & Brass**, 122 A. 2d 109 (Md. Ct. of App. 1956). Distillers and wholesalers are required to post prices (Section 108, Art. 2B, Code, 1957).

Volume discounts forbidden (Reg. No. AB-R5.1, Section 5, Comptroller of the Treasury).

**North Dakota**—General Voluntary “Fair Trade” (Chap. 51-11, Century Code). The “Wholesale Liquor Transaction Tax” must be added to the wholesalers’ price to retailers. (Section 5-03-12, Century Code).

**South Dakota**—General Voluntary “Fair Trade” (Chap. 54.04, Code of 1939). Non-signers bound. **Miles Laboratories v. Owl Drug**, 295 N. W. 292 (S. D. Sup. Ct. 1940).

**Wisconsin**—General Voluntary “Fair Trade” (Title XIV, Chap. 133, Section 133.25, Wis. Stats. 1961). Non-signers bound. **Bulova Watch Co. v. Anderson**, 70 N. W. 2d 243 (Wis. Sup. Ct. 1955). Quantity discounts to on-sale retailers can only be measured by volume in single transaction, delivery and invoice (Section TAX 8.86 Regulations, Dept. of Taxation).

Unfair Sales Act (which applies to all kinds of products) requires 2% wholesaler markup and 6% retail markup (Section 100.30, Stats. 1961).

3. States having mandatory markup or mandatory “fair trade” provisions:

**Arkansas**—Wholesale and retail prices containing a statutory markup must be approved by the Director of Alcoholic Beverage Control (Art. No. 282, Laws 1949, as amended).

**California**—Mandatory “Fair Trade” (Sections 24749-24757, 24850-24881, Business and Professions Code).

**Connecticut**—Mandatory “Fair Trade” including mandatory statutory wholesale markup of 36% on wines (Part V, Liquor Control Act).

**Delaware**—Mandatory “Fair Trade” (Rule 39, Delaware Alcoholic Beverage Control Commission).

**Hawaii**—Mandatory “Fair Trade” (Section 159-17, Rev. Laws 1955).

**Kentucky**—Mandatory minimum statutory markup required of wholesalers and retailers (Sections 244.380-244.460, Rev. Stat. 1953).

**Louisiana**—Mandatory minimum statutory markup required of wholesalers and retailers (Sections 211-219, Alcoholic Beverage Control Law).

**Massachusetts**—Mandatory “Fair Trade” (Section 25-C, Gen. Laws, Chap. 138).

**Minnesota**—Mandatory “Fair Trade” (Section 340.97-340.978, Stats. 1961).

**New Jersey**—Mandatory “Fair Trade” (State Regulation No. 30, Division of Alcoholic Beverage Control).

**New Mexico**—Mandatory minimum statutory markup required of wholesalers and retailers (Sections 46-9-1-46-9-15, Stats. 1953).

**Rhode Island**—Mandatory markup required of wholesalers at no less than markup percentage set by the Liquor Control Administration (Section 3-2-2, Gen. Laws, 1956). Minimum consumer prices (set by distiller) required by Statute (Chap. 169, Laws 1958).

**Tennessee**—Mandatory minimum statutory markup required of wholesalers and retailers (Sections 57-701-57-707, Code Annotated).

4. States having provisions setting maximum prices:

**Kansas**—Distillers’ prices to Kansas wholesalers shall be as low as the lowest price charged by such distiller for the item in any state in the continental United States (Section 41-1112, Gen. Stats. 1949). Alcoholic Beverage

Control Board determines **minimum** wholesale and retail prices including a reasonable markup or profit (Sections 41-1113-41-1121, Gen. Stats. 1949).

**New York**—(See discussion in brief *Amicus Curiae*.)

**South Carolina**—Wholesalers are limited to a markup of 10% and retailers to a markup of 25% (Section 4-72, Chap. 1, Title 4, Code of 1962).

**APPENDIX C.**

In the Supreme Court of the United States.

No. 545.

October Term 1965.

Affidavit of Claud Thompson in Support of Brief of  
Wine, Spirits, Wholesalers of America, Inc.,  
Amicus Curiae.

State of Oklahoma, }  
County of Oklahoma. } ss.

Claud Thompson, of lawful age, being by me first duly sworn according to law, deposes and says:

I am the Executive Secretary of the Oklahoma Wholesale Liquor Association, Inc., a trade association of wholesalers of alcoholic beverages, doing business in Oklahoma, with offices at 4400 North Lincoln, Oklahoma City, Oklahoma. I am thoroughly familiar with the laws, rules, regulations and trade practices affecting the industry in this state. I am thoroughly familiar with the wholesalers' costs in this State and with the wholesale prices to the retailer as they are posted in this State. I am also thoroughly familiar with the brands handled by each of the various wholesalers in Oklahoma as well as the relative proportion of each wholesaler's volume represented by each brand.

The following chart accurately sets forth the various costs, prices and mark ups (as indicated) per case of fifths of the brands listed for the month of December, 1965, in Oklahoma:



# OKLAHOMA WHOLESALE COSTS AND PRICES TO RETAILER PER CASE OF FIFTHS

December 16, 1965

Mfg.	Brand	F. O. B. Cost	Frt. Cost*	State Tax	Laid In Cost**	Price to Re- taller***	Whole- sale Mark Up	Whole- sale Mark Up %
National	Old Crow ....	\$36.17	.60	\$5.76	\$42.53	\$41.80	\$-.73	loss
Walker	Ten High ....	30.15	.60	5.76	36.51	37.23	+ .72	2%
Seagrams	7 Crown .....	34.00	.60	5.76	40.36	41.32	+ .96	2.4%
Seagrams	VO .....	47.87	.60	5.76	54.23	55.19	+ .96	1.8%
Beam	4 yr. ....	33.98	.60	5.76	40.34	41.31	+ .97	2.4%
Brown- Forman	Early Times ..	39.30	.60	5.76	45.66	46.55	+ .89	1.9%
Jack Daniels	Green Label ..	43.74	.60	5.76	50.10	51.04	+ .94	1.9%
Barton	Kentucky Gentlemen ...	33.20	.60	5.76	39.56	40.53	+ .97	2.4%
Glennmore	Yellowstone 86	36.50	.60	5.76	42.86	43.82	+ .96	2.2%
Schenley	Ancient Age ..	37.30	.60	5.76	43.66	43.65	-.01	loss
Melrose	Charter 7 ....	46.58	.60	5.76	52.94	53.03	+ .09	0.17%

\* Most of the above brands are shipped from Kentucky to Oklahoma. Average shipping cost is \$0.60 a case.

\*\* Wholesalers laid-in cost is the F. O. B. cost plus state tax and freight.

\*\*\* Posted Price to Retailer.

The sale of each of the above brands or the brands of each of the owners of the above brands constitutes the substantial business of at least one or more wholesalers in Oklahoma.

Claud Thompson,  
Claud Thompson.

Subscribed and sworn to before me this 3rd day of January, 1966.

My commission expires 4-13-69.

(Seal)

Coleen A. Watson,  
Notary Public.

## APPENDIX D.

State of New York, } ss.  
County of New York. }

Morris O. Alprin, being duly sworn, deposes and says:

1. That he is an attorney-at-law, duly admitted to practice in the State of New York, with offices at 122 East 42nd Street, New York City, N. Y. 10017.

2. That he is the Counsel and Secretary of the Greater New York Wholesale Liquor Dealers Association, Inc., a trade association of wholesale liquor dealers in the Metropolitan area of New York City, N. Y., with offices at 120 East 56th Street, New York City, N. Y. 10022.

3. That he has examined the schedules of prices from suppliers to wholesalers, duly filed with the New York State Liquor Authority, effective for sales to wholesalers in the month of December, 1965.

4. That attached hereto, marked "Appendix A", and made a part hereof, is a schedule reflecting such filed prices from supplier to wholesaler, effective for sales to wholesalers in the month of December, 1965, for certain brands of whiskies in fifths and pints sizes. Where prices were filed f. o. b. point of shipment, freight cost per case was computed on the basis of carload freight rates.

5. That he has examined the schedules of prices from wholesalers to retailers duly filed with the New York State Liquor Authority, effective for sales to retailers in the month of December, 1965.

6. That attached hereto, marked "Appendix B", and made a part hereof, is a schedule reflecting such filed prices from wholesalers to retailers, effective for sales to retailers in the month of December, 1965, for the same

brands of whiskies in the same sizes, as set forth in  
"Appendix A".

Morris O. Alprin.

Sworn to before me this 28th day of December, 1965.

Louise H. White,  
Notary Public.

Louise H. White, Notary Public, State of New York,  
No. 31-9644020. Qualified in New York County. Commis-  
sion Expires March 30, 1966.



**APPENDIX "A"**  
 PRICES FROM SUPPLIER TO WHOLESALERS  
 EFFECTIVE FOR SALES IN DECEMBER, 1965

**APPENDIX "B"**  
 PRICES FROM WHOLESALER TO RETAILER  
 EFFECTIVE FOR SALES IN DECEMBER, 1965

	FOB	Freight	STATE TAX	LABEL USE FEE	TOTAL		
OLD CROW 86" 5TH 4 Yr.	3784	(NOT INCLUDED)	360	180	4324	5TH	4519
PT	4791	(NOT INCLUDED)	450	225	5466	PT	5709
TEN HIGH 86" 5TH 4 Yr.	3034	(NOT INCLUDED)	360	180	3574	5TH	4091
PT	3925	(NOT INCLUDED)	450	225	4500	PT	5122
(FOR PEORIA, ILL.)							
SEVEN CROWN 5TH	34 -	(NOT INCLUDED)	360	180	3970	5TH	4519
(FOR LAWRENCEBURG) PT	4280	(NOT INCLUDED)	450	225	5007	PT	5709
SEAGRAM'S V.O. 5TH	4717	(NOT INCLUDED)	360	180	5305	5TH	6014
(FOR MONTREAL) PT DUTY PAID	59 -	(NOT INCLUDED)	450	225	6629	PT	7489
JIM BEAM 86" 5TH 4 Yr.	3398	(NOT INCLUDED)	360	180	3938	5TH	4519
(FOR CLERMONT, KY) PT	4480	(NOT INCLUDED)	450	225	5035	PT	5709
EARLY TIMES 86" 5TH	3698	(NOT INCLUDED)	360	180	4238	5TH	4730
(FOR LOUISVILLE, KY) PT	4687	(NOT INCLUDED)	450	225	5442	PT	5943
JACK DANIEL 90" GREEN LABEL	NOT SOLD IN NY STATE						
KENTUCKY GENTLEMAN 86" 5TH	3265	(NOT INCLUDED)	360	180	3805	5TH	4006
(FOR BARTSTOWN) PT	4073	(NOT INCLUDED)	450	225	4748	PT	5442
ANCIENT AGE 5TH 86"	3778	(NOT INCLUDED)	360	180	4318	5TH	4705
4 Yr. PT	4902	(NOT INCLUDED)	450	225	5585	PT	5976
YELLOWSTONE 5TH 100"	4485	(NOT INCLUDED)	360	180	5025	5TH	5752
PT	5630	(NOT INCLUDED)	450	225	6385	PT	7235
(FOR LOUISVILLE, KY)							
86" 5TH	3650	(NOT INCLUDED)	360	180	4290	5TH	4693
PT	4620	(NOT INCLUDED)	450	225	5395	PT	6121

14.5% - 27.3%  
DISCOUNT

14.5% - 27.3%  
DISCOUNT

Supreme Court of the State of New York

October Term, 1935

JOSEPH E. BRADY & SONS, INC., et al.

Appellants,  
vs.  
DONALD R. BOSTWICK, Chairman, JOHN D. HART,  
WALTER O. SCHMIDT, BENJAMIN B. HALOON,  
JAMES E. DOYLE, representing the State Liquor  
Authority, and LOUIS J. LEFKOWITZ, Attorney Gen-  
eral of the State of New York.

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

BRIEF FOR APPELLANT

LOUIS J. LEFKOWITZ  
Attorney General of the State  
of New York  
*Attorney for Appellees*

ROTH KIMBLE TOON  
Acting Solicitor General

ROBERT L. HARRISON  
Assistant Attorney General

*of Counsel*



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A State is not required to gear its police power measures to their merchandising maneuvers in which the industry affected engages for its profit. It is on such that appellants base their contentions of difficulty of compliance and their due process argument. Moreover their contentions are sheerly conjectural and speculative and are in fact contradicted by the pricing operations which obtain in the industry in and outside New York State.

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No. 545

# Supreme Court of the United States

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October Term, 1965

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*  
*against*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,  
ROBERT E. DOYLE, constituting the State Liquor  
Authority, and LOUIS J. LEFKOWITZ, Attorney Gen-  
eral of the State of New York,  
*Appellees.*

---

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

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## BRIEF FOR APPELLEES

### Statement

Plaintiffs have appealed from the order of the Court of Appeals of the State of New York holding in all respects valid and constitutional the provisions of the Alcoholic Beverage Control Law of the State of New York challenged by the plaintiffs in this action. The order affirmed the unanimous affirmance of the Appellate Division, Third Judicial Department of the State of New York, which had affirmed the judgment of the Supreme Court of the State of New York which had denied plaintiffs' motion for preliminary injunction and granted defendants' motion for declaratory judgment declaring the statutory provisions constitutional and valid.



This Court noted probable jurisdiction on November 22, 1965 (15 L. ed. 2d 338).

The statutory provisions challenged have not yet been put into effect<sup>1</sup> because plaintiffs obtained a stay on October 29, 1964, the eve of the effective date of the sections (October 31, 1964). The stay was in effect by its terms until the date of the order and judgment of the Court of first instance (April 19, 1965). Thereafter, in lieu of plaintiffs' inevitable application for further stays, the State Liquor Authority refrained from putting the provisions into effect while the appeals were pending first in the Appellate Division (which issued its order of affirmance on May 14, 1965) and then in the Court of Appeals (where the appeal was argued on May 27, 1965). After the Court of Appeals decision on July 9, 1965, Chief Judge DESMOND granted plaintiffs application for a stay pending their application therefor to Mr. Justice HARLAN. Mr. Justice HARLAN granted the stay on August 5, 1965. This stay is now in effect.

### The Action

This action was brought by 62 distillers, wholesalers and importers of alcoholic beverages for a judgment declaring invalid two sections of a 1964 general amendment of the New York Alcoholic Beverage Control Law (Chapter 531, 1964 Laws of New York)<sup>2</sup>. The challenged sections of

<sup>1</sup> Therefore, (*infra*, pp. 49 *et seq.*) all of appellants' arguments as to the effect of the provisions on their business operations are necessarily conjectural and speculative (in addition to having no bearing on the constitutionality of the provisions).

<sup>2</sup> The New York Alcoholic Beverage Control Law (hereinafter sometimes cited as the "ABC Law") regulates the manufacture, sale and distribution of alcoholic beverages within the State of New York. Those who would traffic in alcoholic beverages within the State are required to be licensed by the State.

Chapter 531 are Section 9 and certain provisions of Section 7. Both of these sections amended Section 101-b of the ABC Law which, as its title indicates, covers the subject of "Unlawful Discriminations" in pricing and the "filing of schedules" of prices to wholesalers and retailers with the State Liquor Authority. The text of Sections 7 and 9 of Chapter 531 is set forth in Appendix B hereto.

The concentration of plaintiffs' attack has throughout the litigation been upon Section 9.

The statutory provisions which are the subject of the action will be more fully discussed *infra* under the subheading "The 1964 Liquor Law". In this introductory portion of this brief we note the essence of the provisions, *viz.*:

Section 9 provides that as part of the monthly schedules of brand owners', distillers' or manufacturers' prices to wholesalers, and of wholesalers' prices to retailers, which schedules, since 1942, are required by Section 101-b of the New York ABC Law to be filed for the ensuing month with the State Liquor Authority, there must also be filed an affirmation verified by the brand owner or his designee that the brand price in the schedules is no higher than the lowest price at which the same item of liquor was sold by the brand owner or his designee, or by any related person,<sup>3</sup> to any wholesaler or retailer in any other State of the United States at any time in the month immediately preceding.

The provisions of Section 7 of Chapter 531, amending Section 101-b, subdivision 3(a) of the ABC Law, which the appellants attack are the following: The provision that price schedules must contain "the net bottle and case

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<sup>3</sup> "Related person" is defined in Section 9 in paragraphs (d) and (f).

price paid by the seller.” Necessarily this means the bottle and case price when the seller has *paid* a bottle and case price. The other is that which provides that the prohibition against sale to or purchase by a wholesaler, unless price schedules are filed, applies “irrespective of place of sale or delivery”. Necessarily this affects only wholesalers licensed to sell in New York (Alcoholic Beverage Control Law Section 105[16], sale to or purchase by wholesalers for resale in New York, and the monthly schedules of prices in New York, required to be filed by New York licensees. State Liquor Authority Rule 16, Part 65 § 65.6 [b] [3], § 65.1 [a] [1]). The words “irrespective of place of sale or delivery” were added to eliminate any contentions that sale is not in New York when a New York wholesaler takes delivery at out-of-state distilleries (see *infra*, p. 9).

### Question Presented

In appellants’ “Questions Presented” (Br., pp. 3-4) they have incorporated their contentions of the effect of the statutory provision they attack upon their business operations and they have incorporated their arguments as if these were the undisputed and indisputable facts on which their challenge of constitutionality of the statutes is to be answered.

These are not the “Questions”. They are the very things this Court would have to accept and decide to be proper bases upon which the constitutionality of statutes are determined. The State Courts did not accept them.

The Question Presented on this appeal, in this Court, is single. It is this:

May the State constitutionally provide by statute that, in respect to the monthly schedules of brand prices of

liquor required to be filed by brand owners and wholesalers of liquor (who must be licensed by the State in order to sell their products in the State and are regulated by the State), there must also be filed a verified affirmation by the brand owner that such brand prices in New York State to wholesalers and to retailers are no higher than the lowest prices at which such brands were sold in the preceding month in the United States outside New York State to wholesalers and to retailers by the brand owner, or by any person who has the status of a related person—as defined in the statute—to the brand owner, and that wholesalers who themselves sell elsewhere in the United States outside the State of New York make similar affirmation as to their own prices to retailers?

### **Opinions of the Courts of the State of New York**

The opinions of the New York Court of Appeals (July 9, 1965) are reported in 16 N. Y. 2d 47, 209 N. E. 2d 85, 262 N. Y. S. 2d 453.

The opinion of the New York Appellate Division, Third Department (May 13, 1965), is reported in 23 N. Y. A. D. 2d 933, 259 N. Y. S. 2d 644.

The opinion of the New York Supreme Court, Albany County (April 8, 1965), is reported in 45 Misc. 2d 956, 258 N. Y. S. 2d 442.

The essentials in the opinions of the New York State Courts are set forth here:

#### **Court of Appeals Opinion**

1. **Price Discrimination**—"It [the Moreland Commission] found in effect gross price discrimination against the New York consumer by the industry". (16 N. Y. 2d p. 54).

## 2. Legislative Purpose in 1964 Amendment of ABC Law

—“[I]ts [the Commission's] studies showed no correlation between consumption and prices, looking at the experience in States in which prices were high compared with those in which they were low”. “The result was the enactment of a statute by the Legislature \* \* \* which, among other things vitally changed the direction of liquor price policy in New York and sought to reduce consumer prices”. “[T]he Legislature by Section 9 \* \* \* set up means which sought to keep down the prices of brand liquors to the consumer”. (16 N. Y. 2d at pp. 54, 55).

“Thus it was sought to end the discrimination by the liquor industry against the New York consumer.” (16 N. Y. 2d at p. 55).

## 3. Twenty-first Amendment; State Police Power—“It is thoroughly settled that when it comes to the regulation of liquor traffic a wide area of public power may be exercised in plenary fashion by State governments without Federal interference either under the commerce clause or under the equal protection provisions of the Constitution” (16 N. Y. 2d at p. 57). “[T]he Twenty-first amendment spells out \* \* \* specific and federally protected right of each State to eliminate as well as regulate the liquor traffic within its borders”<sup>5</sup> (16 N. Y. 2d at p. 56).

On the States' power “in matters affecting the welfare of a State and its people, liquor aside,” the Court cited *Hoopeston Co. v. Cullen*, 318 U. S. 313; *Huron Cement Co. v. Detroit*, 362 U. S. 440; *Osborn v. Ozlin*, 310 U. S. 53, (16 N. Y. 2d at p. 59).

<sup>4</sup> Discussing (16 N. Y. 2d at pp. 57-58) *State Board v. Young's Market*, 299 U. S. 59; *Mahoney v. Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395; *Ziffrin, Inc. v. Reeves*, 308 U. S. 132. The opinion distinguished (p. 58) *United States v. Frankfort Distilleries*, 324 U. S. 293; *Hostetter v. Idlewild Liq. Corp.*, 377 U. S. 324; *Department of Revenue v. James Beam Co.*, 377 U. S. 341.

<sup>5</sup> Citing *Mahoney v. Triner Corp.*, 304 U. S. 401.

4. **Regulation of Liquor Industry**—"A long history of regulation, control, price fixing, place of time and sale setting, and outright extinction lies behind the liquor business in this country since Colonial times, and it is too late today to suggest that the rights of those who choose to engage in it are on a constitutional or legal parity with the rights of people who trade in bicycles, or cosmetics or furniture." (16 N. Y. 2d at p. 56).
5. **Due Process**—"If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of opinion they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers." "In light of \* \* \* [the] national marketing situation, the actual difficulty of the distiller in seeing to it that the New York buyer pays no more than 'the lowest price elsewhere' seems greatly overstressed." (16 N. Y. 2d pp. 56, 57).
6. **Monopoly States Pricing Compared**.—Testimony of Moreland Commissioner Walsh is quoted citing "Pennsylvania, a monopoly State, 'the largest purchaser of liquor in the world \* \* \* \$400,000,000 worth of liquor a year—one customer' " \* \* \* "an example of a customer who insists 'on the lowest price that the distiller offers anywhere in the country.' "

\* \* \*

- "The requirement of section 9 is not, indeed, unusual in concept and those States which have State liquor monopolies, we are told, require the distillers to warrant that the price charged the State monopoly for brand liquors is no higher than the price charged in other States. Thus we think the price regulation in the 1964 statute is neither impossible of compliance nor unreasonable." (16 N. Y. 2d at p. 57).
7. **Interstate Commerce**—"In effect the dependence of the New York price on the maximum price of the

distiller for his brand elsewhere is to tie the price in this State into a national price. There is nothing unreasonable about that. It is not an interference with interstate commerce. The effect is on what the distiller charges here and is an effect closely associated with the sale and distribution of liquor within the State.

"That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a device within the power of the State to employ in this regulated activity."

"The incidental effect of this on prices in another State does not invalidate the New York statute." (16 N. Y. 2d at pp. 56, 57).

8. **Anti-Trust; Robinson-Patman Act**—"The provisions of section 9 are not transformed into an 'anti-trust measure' in conflict with the supremacy cause on the basis of plaintiffs' conception that the statute is not 'a device to promote temperance'; nor are they for similar reasons in conflict with the Robinson-Patman Act. \* \* \* It is a strained argument to make, as plaintiffs do, that compliance with the compulsion of a public statute which seeks to keep down the price of liquor is the equivalent of an unlawful conspiracy to violate the Sherman Act." (16 N. Y. 2d at p. 59).

The opinion concluded as to plaintiffs' argument that the 1964 statute is not suited to the promotion of temperance and hence the main justification of a valid regulation of liquor is lost, with this comment: "As to what best promotes temperance among the people of New York it seems preferable to take the opinion of the Governor and the Legislature rather than that of the liquor industry." (16 N. Y. 2d, at pp. 59, 60).



To plaintiffs' attack upon portions of § 7, the Court's response was (16 N. Y. 2d, p. 59):

"The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intrastate sale of liquor."

This construction of a New York statute by the State's highest court, this Court will accept as "binding" upon it. *N. A. A. C. P. v. Button*, 371 U. S. 415, 432 (1963). As Mr. Justice BRENNAN said in that case:

"For us the words of Virginia's highest court are the words of the statute \* \* \* 'we are not left to speculate at large upon the possible implications of bare statutory language.' "

The basis of the dissenting opinion was that the statute was not justified as a police power exercise. (16 N. Y. 2d, at p. 60).

#### **Appellate Division Opinion**

##### **1. Price Discrimination; Legislative Policy in 1964 Amendment of ABC Law.—**

"The legislative policy sought to be effectuated by the amendments in dispute was declared to be, among other things, to foster price competition, to *eliminate discrimination against New York consumers* and 'to forestall possible monopolistic and anti-competitive practices *designed to frustrate the elimination of such discrimination*', *price discrimination and favoritism being found 'contrary to the best interests and welfare of the people of this state'.*" (23 N. Y. A. D. 2d, at p. 934; Italics ours)

2. **Police Power**—"[T]he enactment constitutes a valid exercise of the police power." (23 N. Y. 2d at p. 934).
3. **Robinson-Patman Act; Sherman Act; Supremacy Clause; Commerce Clause**—"Appellants argue forcefully that the maximum price provisions of the amendments contravene the Robinson-Patman Act \* \* \* and the Sherman Act \* \* \* and thus are violative of the supremacy clause and that the challenged amendments offend the commerce clause as well. The complete answer is, we believe, that the legislation lies well within the area of liquor traffic regulation, in which, under the Federal Constitution, effective control may be exercised by the States" (23 N. Y. A. D. 2d at p. 934, citing the Twenty-first Amendment and the classic decisions of this Court under the Amendment, and distinguishing *Frankfort Distillers*, the *Idlewild* case and *Department of Revenue v. Beam*).
4. **Due Process**—"The enactment \* \* \* effects no deprivation of due process." (23 N. Y. A. D. 2d, at p. 934).
5. **Equal Protection**—"Neither in the record nor in appellants' argument do we find a substantial basis for the assertion that equal protection has been denied." (23 N. Y. A. D. 2d, at p. 934).
6. **Other Contentions**—"Appellants' remaining contentions seem to us unsubstantial and do not require discussion." (23 N. Y. A. D. 2d at p. 934).

#### **State Supreme Court Opinion**

Justice STALEY's opinion in the Court of first instance weighed *seriatim* the allegations of the complaint and all of plaintiffs' arguments and passed upon all of them. On each of the arguments raised by plaintiffs he held to the same effect as did, subsequently, the Appellate Division and the Court of Appeals:

### 1. Due Process—

“Courts no longer employ the due process clause of the Constitution to invalidate State laws regulatory of business and industrial conditions merely because such laws are deemed unwise or improvident. (*Williamson v. Lee Optical Co.*, 348 U. S. 483. \* \* \*).

“Nor will the court sit as a superlegislature to weigh the wisdom of each enactment brought before it, or decide whether policy which it expresses offends the welfare of a particular group. (*Day-Brite Light v. Missouri*, 342 U. S. 421 \* \* \*).

“Nor are legislative enactments rendered invalid as a denial of due process or equal protection under the law because they impose financial hardship, result in reduced income or make it impossible for some to continue in a particular business. (*California Auto. Assn. v. Maloney*, 341 U. S. 105; *Breard v. Alexandria*, 341 U. S. 622; *Day-Brite Light v. Missouri*, *supra*; \* \* \*).

“Plaintiffs’ attack on chapter 531 on the basis that it deprives them of liberty and property without due process of law \* \* \*, allege economic hardships, possible reduced profit margins, expenditures for new equipment, possible difficulty in increasing prices and difficulty in competing in other States. These allegations, even if proven, have no bearing on the constitutionality of the statute. (*California Auto. Assn. v. Maloney*, *supra*; *Breard v. Alexandria*, *supra*; *Day-Brite Light v. Missouri*, *supra*; \* \* \*.)” (45 N. Y. Misc. 2d, at pp. 961, 962).

2. **Police Power**—“Being an enactment under the police power of the State, the strongest presumption of validity attaches to chapter 531 of the Laws of 1964 and the fact that it causes or might cause an economic hardship to those whom it affects is no argument against its constitutional validity, if it is an otherwise valid exercise of the State’s police power. “The choice of measures is for the Legislature who are presumed to have investigated the subject and to have acted with reason not from caprice. ‘Legis-

lation passed in the exercise of the police power must be reasonable in the sense that it must be based on reason as distinct from being wholly arbitrary or capricious, but when the legislature has power to legislate on a subject, the courts may only look into its enactment far enough to see whether it is in any view adapted to the end intended. If it is, the court must give it effect, however unwise they may regard it, or however much they might, if given the choice, prefer some other measure as more fit and appropriate.' (*People v. Griswold*, 213 N. Y. 92, 97.)" (45 N. Y. Misc. 2d at p. 962).

3. **Price Discrimination; Difficulty of Compliance**—"The provisions of chapter 531 requiring filing price schedules and affirmations are not, in and of themselves, either arbitrary or unreasonable. Such filings are certainly appropriate to the purpose intended of preventing consumers in New York State from being discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states. The fact that the plaintiffs might find it difficult to obtain the required information or are limited by the act in the price differentials allowed, does not make the act arbitrary, capricious and unreasonable." (45 N. Y. Misc. 2d, at p. 963).
4. **Equal Protection**—"The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.' (*Tigner v. Texas*, 310 U. S. 141, 147.) The fact that the Legislature omitted certain ones who might have been included in the statute, does not render it unconstitutional." (45 N. Y. Misc. 2d, at pp. 964, 965).
5. **Twenty-First Amendment**—"There is no doubt that under the Twenty-first Amendment of the Constitution of the United States that the State of New York may \* \* \* regulate, \* \* \* and may also restrict, prevent, regulate and control by taxation or otherwise, the distribution, use or consumption of intoxicants within the State. (*California v. Washington*, 358 U. S. 64; *Department of Revenue v. Beam Dis-*

*tilling Co.*, 377 U. S. 341; *Hostetter v. Idlewild Liq. Corp.*, 377 U. S. 324.)" (45 N. Y. Misc. 2d, at p. 964).

6. **Interstate Commerce**—"The Alcoholic Beverage Control Law of the State of New York concerns itself solely with the regulation and control of the manufacture, sale and distribution within the State of New York of alcoholic beverages. \* \* \* Any effect which it has on interstate commerce is entirely coincidental. The regulation and control of the sale and distribution of alcoholic beverages is a matter of local concern and the mere fact that such regulations have or may have some repercussions upon the activities of a business which operates Nationwide does not invalidate the State action, particularly where the subject of the action is within the police power of the State. (*Osborn v. Ozlin*, 310 U. S. 53; *Southern Pacific Co. v. Arizona*, 325 U. S. 761; *Watson v. Employers Liab. Corp.*, 348 U. S. 66.)" (45 N. Y. Misc. 2d, at p. 964).
7. **Sherman Act; Robinson-Patman Act**—"The commerce clause of the United States Constitution, the Sherman Act and the Robinson-Patman Act are all concerned with interstate commerce as distinguished from intrastate commerce. Since the purpose of the Alcoholic Beverage Control Law is to regulate and control the intrastate sale and distribution of alcoholic beverages, it does not come within the realm of the commerce clause of the United States Constitution nor of the Sherman Act or of the Robinson-Patman Act." (45 N. Y. Misc. 2d, at p. 964).

### **The Genesis of the 1964 Liquor Law**

In 1963 Governor Rockefeller appointed a Moreland Commission to undertake a "thorough study and reappraisal of the [New York Alcoholic Beverage Control] Law with respect to the sale and distribution of alcoholic beverages in the State, to examine and investigate \* \* \* the methods and practices of manufacturers, distributors and

retailers of alcoholic beverages in the State" and to propose any revisions of the law which might be found necessary "in the light of experience and current social and economic conditions" (Executive Order February 15, 1963).

The Governor's announcement of appointment of the Commission and the Executive Order (February 15, 1963) noted that the Alcoholic Beverage Control Law had been enacted in 1934, "following closely" the repeal of Prohibition, and that there had been "no major reappraisal or revision of the law in the light of experience and current social problems and economic conditions".

#### **Liquor Prices and Temperance**

The Commission's "basic re-examination" was not only of the Alcoholic Beverage Control Law but also of "the major assumptions on which it rests". This included an examination of experience to learn whether the statutory provisions relative to distribution promoted temperance. (Moreland Commission Report and Recommendations #1, p. 3)

It was found that "figures show a steadily increasing amount of per capita consumption in the nation and a greater than average increase in New York State" (*id.*, and see *State Monopoly and Price Fixing in Retail Liquor Distribution*, John E. Dunsford, Wisconsin Law Review [May 1962] pp. 454, 480-481, 482, 484); that the theory at the time of repeal that high prices would retard the sale and consumption of liquor was shown by 30 years' experience to have been erroneous (minimum liquor prices had been the statutory result of this theory); that all that minimum prices have accomplished has been to benefit the industry (*cf. State Monopoly and Price Fixing in Retail*

*Liquor Distribution, supra*, pp. 479, 484). What has been traditionally (going back to Colonial times) and was to be after Prohibition a stringently regulated industry, had become a protected industry—protected as no other private industry is protected. The Moreland Commission found (Report #3) that “the argument that high prices promote temperance in that they keep liquor out of the hands of those who should not have it is \* \* \* unfounded” (*id.*, p. 17). See *infra* Borregard & Glusker, Yale Law School (1950), *The Distilled Spirits Industry; A Marketing Survey*. “To test the thesis that high prices promote temperance” (Moreland Commission Report #3), the Moreland Commission examined the “high” and “low” price States and the per capita apparent consumption in the States and found no pattern to indicate that high prices and low consumption co-existed, or low prices and high consumption (*id.*, pp. 17-18). It found no discernible relationship between consumption patterns in “low” or “high” price States.

The Commission concluded that all that high consumer prices accomplished was to benefit the industry at the expense of the New York State consumer. The Commission recommended repeal of § 101-c of the Alcoholic Beverage Control Law, which had provided for minimum consumer resale prices fixed by brand owners and enforced by the State Liquor Authority.

The Interim Report of the Commission on August 30, 1963, after six months of study, had queried in respect to § 101-c: “The history of this \* \* \* restriction \* \* \* raises a question as to whether protection of the profitability of the liquor industry is a proper objective” of regulation (p. 12).



On "promotion of temperance" which plaintiffs have all through this litigation urgently contended is the sole permissible purpose of state laws regulating or restraining the liquor industry, the Moreland Commission Report observed (Report #1, p. 3):

"the industry apparently regards as 'temperate' those increases in consumption which accompany 'accepted' merchandising methods, including extensive advertising expenditures. With equal disregard for objective standards of measurement, most of the industry claims that 'temperance' has been fostered by the existing restrictions on the distributive system, but states that it has no means of proving this by reference to any statistics" (*id.*, p. 3).

Appellants, it might be noted, continue in this action this illogical position. While decrying the requirement of § 9 as not conducive to the temperance purpose of the Alcoholic Beverage Control Law,<sup>6</sup> with dramatic inconsistency, the pervading thesis of their case is speculation as to the frustrating effect § 9 would have on the merchandising and pricing practices in which they indulge outside New York State to spur their sales and increase their profits (Br. pp. 28, 58). The vast sums distillers spend on brand advertising are of course for the purpose of stimulating sales (see Moreland Commission Report #3, p. 17) with no qualms as to the effect on temperance.

#### **Wholesale Liquor Prices in New York State**

As to prices in New York State, the Moreland Commission study found that "many retail prices in the District of Columbia are below the cost to New York State retail-

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<sup>6</sup> That all sections of the Alcoholic Beverage Control Law need not promote the temperance purpose of liquor regulation and that the public interest which is generally to be promoted pursuant to the statute, and the State's police power generally, authorize the enactment of § 9 is discussed *infra* Point II.

ers" (Study Paper Number 5, p. 32 [October 28, 1963] by Harold L. Wattel). The following table is set forth in the study paper as illustrative *id.*:

TABLE 13

Retail Prices of Selected Distilled Spirits Brands,  
Washington, D. C., Compared With Wholesale  
Prices of the Same Brands, New York  
State, August-September, 1963

Brand	Fifths	
	Washington, D. C. Retail Price	New York State Wholesale Price
P. M. (Blend)	\$2.85	\$3.45
Old Crow (Straight)	3.39	4.15
Gilbey's Gin	2.87	3.17
Haig and Haig (Scotch)	4.59	5.31
Seagram's V. O. (Canadian)	4.87	5.06

Sources: *Beverage Media*, August, 1963; *Washington Post*, September 4, 1963, and field survey by author.

The final report of the Moreland Commission on Prices (Report #3, January 21, 1964) declares:

"New York *wholesale* prices for packaged whiskey are so high that New York retailers actually pay higher purchase prices in many instances than ultimate consumers pay for the same products in other areas." (pp. 5-6. *Italics in Report.*)

A chart is set forth illustrating and supporting this statement, which compares wholesale prices per Fifth in New York for 18 brands with consumer prices in Washington, Miami and Chicago.

#### Executive and Legislative Action following the Moreland Commission Reports

Following the submission of the Moreland Commission reports on January 21, 1964, Governor Rockefeller on Feb-

ruary 10, 1964, submitted a special message to the Legislature summing up the Commission's conclusions. He noted that the Commission reported "[T]hat the liquor industry has acquired the dominant hold in a field properly regarded as one requiring public regulation; no other industry has its economic interests so uniquely favored with statutory protections; and it is contrary to the public interest to have the regulated industry in such a dominant role".

Among the Commission's goals, said the Governor's special message, had been:

"Bringing justice to the consumer by putting to an end artificial devices whereby the liquor industry has received uniquely beneficial treatment at the consumer's expense."

On the subject of "Distiller-Fixed Consumer Prices", the Governor's message declared that the Commission's findings indicate that

"\* \* \* New York consumers have been compelled to pay on the average \$1 more per fifth of liquor than they would have to pay if there were a free market. \* \* \* The total bill for this surcharge foisted on New Yorkers now runs to \$150 million a year and it is rising every year.

"The present system of price control has no significant effect upon the consumption of alcoholic beverages upon temperance or upon the incidence of social problems related to alcohol."

On February 26, 1964 the "Joint Legislative Committee For Study of Alcoholic Beverage Control Law" held a public hearing at which the Moreland Commission Report was discussed.

On behalf of the package stores which opposed the elimination of the minimum consumer price provision (§ 101-C),

there was testimony that such elimination "without wholesale price reductions" would continue to compel present retail prices in order for retailers "to stay in business" (Minutes of the Hearing, p. 300). This testimony continued:

"It is argued that eliminating price stabilization will cause the distillers to lower their prices due to competition among themselves. But it must be emphasized that price stabilization is not price control. *There is no law on the books of the State of New York right now, today, that prevents the distiller from lowering his prices. Therefore, if this free market theory of the Moreland Commission works so well, why then don't the distillers lower their prices right now?* Now it seems clear that it is not retail price stabilization which is at fault, but the level at which prices are being controlled, if they are at all." (Italics ours.)

No liquor legislation passed before the Legislature adjourned its regular session on March 26, 1964.

Three weeks later, Governor Rockefeller convened a Special Session of the Legislature. His Message calling the session asked for repeal of § 101-c, the minimum consumer resale price provision, and also for legislation providing that brand prices in New York State be "certified" to be "at least as low as the price charged in any other State or Washington, D. C."

It was at this Special Session that all of the 1964 amendments to the Alcoholic Beverage Control Law were adopted in one chapter (Chapter 531).

### **The 1964 Liquor Law**

Chapter 531 of the Laws of 1964, adopted at the Special Session amended the Alcoholic Beverage Control Law on several subjects.

The 1964 amendments were designed to eliminate or change provisions of the law enacted closely upon the repeal of Prohibition, pursuant to concepts which, at the time the law was passed, were thought wise regulation of the sale of alcoholic beverages, but which on reappraisal after 30 years were found not to have accomplished the desired purpose or to have produced some evil results, or simply to have the effect of exploiting the purchaser of liquor in New York State to the benefit of the industry.

Two key provisions of the 1964 law (§§ 13-14) eliminating the pre-existing requirement (§ 105, subds. 4 and 4-a) for certain distances between location of package stores, were attacked and upheld by the Court of Appeals of New York in *Martin, et al. v. State Liquor Authority* (15 N. Y. 2d 707)<sup>7</sup> on the opinion of Mr. Justice LAWRENCE H. COOKE in Supreme Court Court [43 N. Y. Misc. 2d 682].

Section 8 of the 1964 statute stated its purpose in respect to liquor prices:

"8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) *that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states*, and that the price discrimination and favoritism are contrary to the best interest and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. *In order to forestall possible*

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<sup>7</sup> In that litigation the plaintiffs argued, vehemently, just as plaintiffs do here that the amendment they were attacking was not consonant with the temperance purpose of the Alcoholic Beverage Control Law but rather inimical to that purpose.

*monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination."* (Italics ours.)

Section 11 of the statute repealed § 101-c of the Alcoholic Beverage Control Law which had provided for brand owner fixed minimum resale prices to be enforced by the State Liquor Authority and for violation of which the retailer was subject to suspension, cancellation or revocation of his license and money penalty (§ 101-c, subd. 7).<sup>\*</sup>

The goal of bringing down prices was then further implemented by § 9, which amended § 101-b of the Alcoholic Beverage Control Law. The provisions of that section (subd. 3) which for 22 years have required the filing of price schedules by brand owners and wholesalers, were also amended in several details by § 7 of the statute.

## Section 9

We have noted above the essence of § 9, the requirement of the filing of (a) affirmation by the *brand owner* that the filed prices of brands in this state, distiller to wholesaler, for an ensuing month be no more than in any other State or in the District of Columbia in the preceding month, and (b) affirmation by the *brand owner* that its wholesale prices to retailers or the prices of its brands to retailers

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<sup>\*</sup> Any hoped for benefit in lower consumer prices from the repeal of this provision has been frustrated by Distillers making "Fair Trade" contracts with retailers pursuant to New York State's Fair Trade Law (New York General Business Law, Art. XXIV-A; see *National Distillers and Chemical Corporation v. Seyopp*, N. Y. Court of Appeals, January 20, 1965).

by wholesalers in this State, which have a related person relationship to the brand owner, are no more than such prices in the preceding month in any other state or in the District of Columbia by the brand owner or a wholesaler which has a related person relationship to the brand owner.

The lowest price outside New York, which § 9 makes the standard for New York prices, is such price after discounts, rebates, free goods, allowances and other inducements to the purchasers in other States. ("i" of § 9 [§ 101-b, subd. 3-i].)

A "related person" is defined in detail in § 9 (¶¶ [d] and [f]) as one related to the brand owner in that (1) the brand owner has in the wholesaler's business direct or indirect stock ownership, standing as lender or lienor, or there are interlocking directors or officers, (2) the exclusive, principal or substantial business of the wholesaler is the sale of the brand owner's product or products, or (3) the wholesaler holds an exclusive franchise from the brand owner. The factors defining a "related person" in item (1) of the definition are similar to those which by pre-existing § 101 (subd. 1, ¶¶ [a], [b]), § 105 (subds. 16, 17), § 106 (subds. 13, 14) constitute relationships interdicted between manufacturers or wholesalers on the one hand and retailers both for on-premises and off-premises consumption. They are thus familiar to distillers, manufacturers and wholesalers doing business in liquor in New York State. See also § 101, subdivision 1 (c).

Wholesalers who are not "related persons" are required to file affirmations only as to their own prices outside New York State, if they sell outside New York State. (§ 9, ¶ [g]. See also ¶ [e].)



**Section 7, Subdivision 3 (a)**

The Court of Appeals of New York has construed this provision contrary to appellants' contentions, and such construction this Court accepts as binding (*supra* p. 9; *N. A. A. C. P. v. Button*, 371 U. S. 415, 432). Section 7, will therefore not be additionally discussed in this brief.

**Some Similar Statutory Language in the Alcoholic Beverage Control Law Prior to §9, Construed and Applied by the State Liquor Authority and the Industry for 22 Years.**

In their complaint and affidavits plaintiffs pleaded that several words used in Section 9 are vague and that they would be at a loss as to how to comply with such language. As the case moved through the State courts, they abandoned their "vagueness" argument as to one word after another until in this Court, they confine that argument to the word "substantial" (Br. p. 66). We answer this last contention *infra*. Because appellants' complaint and affidavits are in the record in this Court, including their claims of vagueness of other language in Section 9, although no argument thereon is pressed, in Appendix A to this brief we note some language in pre-existing sections of the Alcoholic Beverage Control Law which is the prototype of language in § 9. With the earlier sections, the industry has found it possible to comply for 22 years with, where occasion indicated, guidance from the State Liquor Authority (Phillips' Affidavit on behalf of Defendants' R. 311-314). This rebuts completely appellants' contentions as to such language that it is vague and the appellants would not know what falls within it (*e.g.*, Br. p. 66).

In addition to setting out in Appendix A pre-existing sections using this language, we also compare pre-existing sections using language similar to item 1 of the definition of "related person".

**Some of the Characteristics of the Industry to Which Section 9 Applies in Respect to Merchandising and Pricing Practices.**

The Legislature was not legislating in the abstract when it enacted § 9. It was enacting a regulatory provision to apply to a particular Industry, with, it is to be presumed, an awareness of the distribution and pricing practices of the Industry.

Similarly, appellants' arguments here are not to be considered in the abstract, but in the light of the merchandising and pricing practices of the Industry.

The Industry does not publicize or announce its merchandising and pricing practices. They are, however, matter of common knowledge among those practically acquainted with the Industry. It is, as has been said, to be presumed that the New York State Legislature was aware of the situation when it enacted § 9. The Industry had been the subject, for several years, of study; of a great deal of discussion publicly, in and out of legislative precincts; and, we may be certain, with members of the Legislature. The Legislature could act on its common knowledge, on its pooled general knowledge (*United States v. Carolene Products Co.*, 304 U. S. 144, 152-3).

The Legislature was seeking to achieve lower prices of liquor to consumers in New York, which prices had been found after study to be higher in New York than in many places outside New York. These prices had been state-protected and enforced under § 101-c of the Alcoholic Bever-

age Control Law. The Moreland Commission had found that wholesaler to retailer prices were higher in many instances in New York than retailer to consumer prices elsewhere (*supra*, pp. 17-18). It is to be presumed that the Legislature and its members learned of the operations of the Industry, as to the manner in which wholesale prices are determined, and generally as to the manner in which brand owners market their brands through wholesalers (*cf. Martin v. State Liquor Authority*, 15 N. Y. 2d 707 [1965], *aff'g* Opinion of COOKE, J., 43 N. Y. Misc. 2d 682, 685). It is to be presumed that on this knowledge the Legislature dealt as it did with distiller and wholesaler prices when it also repealed the statutory minimum consumer price provision.

In addition, the merchandising and pricing practices in the Industry can be deduced from distribution patterns and from wholesaler to retailer prices in this State and elsewhere (*infra*). Occasionally something on the subject appears in testimony in litigations. Much is revealed by statements in the very affidavits in this case. And there have been some published objective studies of the industry. The latter all attest to the hold of the manufacturer on the merchandising and pricing of their brands from the time they leave the distiller until they reach the consumer.

The known characteristics of the Industry in respect to merchandising and pricing make clear the reason for and purpose of § 9. They also demonstrate the disingenuousness of appellants' contentions (*e.g.*, Br. pp. 62-63) of problems and of the legal propriety of obtaining information for the purpose of compliance (Br. pp. 28, 45-46).

Appreciation of the merchandising and pricing practices in the industry makes clear indeed that it is not this statute which is incompatible, as appellants argue (Br., Point II),

with anti-monopoly and price anti-discrimination acts but, if anything, current industry practices.<sup>9</sup>

Objective studies have concluded that because of the high degree of concentration in the industry, the "areas in which the autonomous decisions of the wholesaler, retailer or small distiller are significant are correspondingly narrow, \* \* \*. The economist would say that we are dealing with an oligopolistic<sup>10</sup> industry, whose product is a monopolistically differentiated one, and whose pattern of price fixing [was] legally sanctioned" (*The Distiller Spirits Industry: A Marketing Survey*, Borregard & Glusker, Yale Law School [1950] pp. 15-16).

The distilling of whiskey in the United States is in the hands of at most 88 companies (Moreland Commission Study Paper #5, p. 7), which have gross annual sales of nearly \$5 billion. Four of the distillers known in the industry as the "big four" do some 60% of the business of distilling or manufacture and set its pace. These four are among the appellants in this action. Three of the affidavits on behalf of the appellants are made by vice-presidents of three of the "big four" (Lind, Revit, Hermann).

The industry is characterized by its brand consciousness. Each distiller has a number of brands (see, *e.g.*, Affidavits

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<sup>9</sup> In the current session of the Legislature, hearings are being conducted by a joint legislative committee (Senator Seymour R. Thaler, Chairman) in an endeavor to find the answer to the continued high prices of alcoholic beverages in New York State since the 1964 liquor law became effective. The minutes of hearings already held are not yet available. As reported in the press the pricing practices of the industry starting with the distillers and down the line as described above and *infra*, pp. 54-57, are supported and documented by testimony that is being given at these hearings.

<sup>10</sup> An "oligopoly" is defined by economists as an industry in which a few sellers are dominant (*id.* p. 147).

of Lind, Street, and Hermann, listing brands of Seagram, Hiram Walker and National Distillers). Each brand is in a price class—(AA Prime, AA, A Prime, A, B, C). Each distiller—certainly the big four distillers—has a brand or brands within each class. (Moreland Commission Study Paper #5, p. 11.)

The brand class of a distiller's product, the retention of its prestige, is the supervening concern of the distiller. Brands are developed with the purpose of fitting into a certain class. The class is equated with the consumer price per bottle. The selling prices from distillery through wholesaler to retailer are arrived at on a mark-up scale for the brand intended as a "prime" or other class brand.

The industry considers its competitive weapon to be not price, but brand building and creating brand demand by brand advertising. The competition is not between distillers as such but between equivalent brand classes (*Industrial Pricing and Market Practices*, Alfred R. Oxenfeldt, "Whiskey Prices", p. 476; *The Whiskey Industry*, Harold L. Wattel<sup>11</sup> [1953 New School for Social Research doctoral thesis] Vol. II, p. 353).

From this concern in maintaining the prestige of its brands in its various brand classes the following truth concerning the industry has come about:

The distiller holds a firm grip on wholesaler to retailer prices. It does so through its methods of merchandising in the States where there are wholesalers, *i.e.*, the "open" or "license" States.<sup>12</sup> Distillers sell in these States through

<sup>11</sup> Author of Study Paper No. 5 for the Moreland Commission, cited *supra*.

<sup>12</sup> The Monopoly States are considered in the next topic of this brief.

a limited number of wholesalers. The largest national distillers, such as Seagrams, have but 330 wholesalers (Lind Affidavit, R. p. 193); National Distillers have 230 (Hermann Affidavit, R. p. 225); Hiram Walker has 105 (Revit Affidavit, R. p. 205). In a State with as large a volume of liquor sales as New York (12% of the nation's total [Br., p. 14]), Brown Forman sells to but 9 wholesalers (Street Affidavit, R. p. 217).

The distillers know precisely the percentage of business each of their wholesalers does in their product (Lind Affidavit for Plaintiffs, R. pp. 193-4, itemizing the percentage of business in Seagram's brands done by each of its 330 wholesalers).<sup>13</sup>

Distillers usually restrict their wholesalers in that they may not sell other distillers' brands in the same price class. (*Industrial Pricing and Market Practices*, Alfred R. Oxenfeldt, "Whiskey Prices", p. 477; *The Distilled Spirits Industry: A Marketing Survey*, Borregard & Glusker, Yale Law School [1950], pp. 88, 91.) With exceptions, wholesalers will do the substantial part of their business in a particular brand or in the brands of one distiller, either by virtue of an exclusive franchise, by contract so specifying, or by the fact of having the distributorship in an area (see as to New York, *infra*, Point II, B).

Thus the merchandising practices and pricing by its wholesalers are guided by the distiller (Borregard & Glus-

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<sup>13</sup> The affidavit recites (pp. 193-4):

- 16 of their wholesalers do 75% or more of their business in Seagram brands.
- 61 of their wholesalers do approximately 60-75% of their business in Seagram brands.
- 73 do 40-60% of their business in Seagram brands.
- 79 do 20-40% of their business in Seagram brands.
- 64 do 5-20% of their business in Seagram brands.
- 37 do 1-5% of their business in Seagram brands.

ker, *The Distilled Spirits Industry, supra*, pp. 92-93, 96, 99, 133-134; Oxenfeldt, *Industrial Pricing and Market Practices*, "Whiskey Prices", pp. 477, 483; Wattel, *The Whiskey Industry*, Vol. II, pp. 388, 434). Indeed, wholesale prices have, bluntly, been said to be "dictated" by the distiller (Borregard & Glusker, *The Distilled Spirits Industry*, p. 87), who sets the price structure at all levels of the industry (Wattel, *The Whiskey Industry*, Vol. II, p. 388).

The wholesaler's continuing in business depends on his having the brand products to sell. Departure from distiller "suggested" prices, from the mark-up spelled out to it by the distiller, means loss of the franchise or of the distribution of the distiller's brand or brands. Loss of one distiller's brand or brands for cause makes it unlikely that the wholesaler would get the distributorship of another major distillery. Distillers may be competitors, but the maverick wholesaler as to one distiller would be suspect by the others (*Studies, supra*).

The liquor wholesaler may be independent as a business entity (which appellants assert, Br. pp. 13-14, 62). But independent of the distiller whose brand is the mainstay of its business, it is not. Neither as to pricing nor as to merchandising practices.

While the wholesaler is therefore not independent on pricing, his consolation is large volume sales, because the number of wholesalers for a brand is few and the proportion of retailers to wholesalers is large.

As to control over merchandising practices, the distillers' is impressive. Structurally the big four distillers which set the pattern for the operations of the others, the distillers which operate nationwide and therefore would



have operations in other States to consider in making affirmations under § 9, are highly organized (Lind Deposition in *Laird v. Gage* [Kansas District Court, 1964<sup>14</sup>]): They have within themselves a federation, so to speak, of geographic regions: Eastern, Southern, Western, etc. Each is under the responsibility of a company vice president. Each region is then constituted of divisions which include several States. A company officer is in charge of each division. Each State in which the company operates is under the supervision of a company executive, and so on. They have field supervisors and representatives. The reporting is from the lowest unit at the bottom on up through State directors, division directors, regional directors, to the top (*e.g.* Hermann Affidavit, R. p. 226).

The companies necessarily have massive marketing staffs which fan across the country wherever their brands are sold. They have field representatives, known colloquially in the industry as "missionaries", who watch over the merchandising of their brands and their prices. (Lind Deposition in *Laird v. Gage*, *supra*; Oxenfeldt, *Industrial Pricing and Market Practices*, "Whiskey Prices", p. 477; Borregard & Glusker, *The Distilled Spirits Industry: A Marketing Survey*, P. 75.)

We have seen from Mr. Lind's affidavit that each and every one of Seagram's wholesalers was willing to disclose—if Seagram did not already know—precisely how much of the wholesaler's total business was in Seagram products. (That is, the total of the wholesaler's business, including that which he did in the products of other distillers.) When a distiller has been able to obtain this infor-

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<sup>14</sup> This is the case involving the validity of a Kansas statute having the same purpose as the New York statute here involved, but totally different in provision, which was held unconstitutional (Br., p. 49. It is presently on appeal to the Supreme Court of Kansas).

mation even from wholesalers who do only 1%-5% of their business in the distiller's brand (*supra*, p. 28), would one not be obliged to eye quizzically and with considerable skepticism appellants' argument (Br. pp. 62-63) that even related wholesalers will not tell the brand owner what they charge for the brand owner's *own* product?

**Sale of Distilled Spirits to "Monopoly" or "Control" States.**

In addition to the sale of liquor by wholesalers in States commonly termed "open" or "license" States to whom distillers sell their brands, which has been discussed above, liquor is also sold in the United States by the States themselves. Such States are referred to as "monopoly" or "control" States.

There are 17 such States where liquor is sold by the State and not by private enterprise. In 16 of these it is sold by the State at wholesale and retail level for off-premises consumption; in the 17th (Wyoming) on the wholesale level only. In all 17 States thus the distiller sells to the State directly without intervening wholesaler.

In selling to all of these States the distiller must warrant that the distiller's price to the control State is no higher than the lowest price in any other State at the instant of sale (see Street Affidavit on behalf of Plaintiffs, R. p. 220). In at least some of these States, *e.g.*, Pennsylvania, such charge must reflect the cash or commodity allowances, post-offs or discounts offered purchasers in any other State (Phillips' Affidavit for Defendants, R. p. 313). Opinion of Court of Appeals, 16 N. Y. 2d at p. 57.

### Summary of Argument

Plaintiffs' arguments are built on a platform which they first construct, not of any actualities nor of the statutory provisions they are attacking, but of conjecture, of speculation, of *their* opinion—which they stoutly assert as fact—of what the statute does and is, or does not do or is not. For example, Point heading I (Br. p. 25): the statute "levies an economic burden on the operations of the distilled spirits industry in other States". Or, another example (in connection with their supremacy argument): "even assuming the Act to be otherwise in furtherance of the State's police power which is not the case here" (Br. p. 43). Their arguments of constitutional violations must needs fall resting as they do on such groundless assumptions.

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Appellants' arguments of the effect of the statute upon their profits and of the problems of compliance—conjectural and speculative and demonstrated to be hollow by distribution and pricing practices of the Industry generally and in New York State—have no bearing on the constitutionality of the statute; would have no bearing even if compliance would confront appellants with great difficulty and expense.

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Section 9 is an internal regulation of the sale of liquor within the borders of the State and is, as is the State's entire Alcoholic Beverage Control Law, and as are the liquor laws of all the States (including the "monopoly" or "control" States) constitutionally within the State's power under the Twenty-first Amendment.

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Moreover this is an enactment under the Police Power. Control of maximum prices of commodities and services is a proper exercise of the Police Power.

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Were the subject of § 9 a product other than liquor (and thus the Twenty-first Amendment not determinative) and did the existence of the law have any repercussions in other States, this would not constitute interference with Interstate Commerce.

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The Sherman Act and Robinson-Patman Act are also irrelative to § 9. The remedial objectives of the former are totally different from the remedial objective of § 9 and there is no issue of conflict or harmony between the federal acts and § 9, and no issue of supremacy. This would be so were the subject of § 9 a product other than liquor and thus the Twenty-first amendment not determinative.

### POINT I

**Section 9 is an internal regulation of the sale of liquor within the borders of New York State by those licensed by the State to traffic in liquor within the State. It thus is an enactment constitutionally within the State's power under the Twenty-first Amendment of the United States Constitution, as is the State's entire Alcoholic Beverage Control law and as are the laws of all states controlling traffic in liquor therein.**

Every State in the United States has its own statute in respect to the sale of liquor therein. Regulation in each State is according to its own lights of what is in the public

interest of its people. Some States, after Repeal, continued to prohibit the sale of liquor. At least one still does. Seventeen States have prohibited private enterprise engaging at all in the sale of liquor, making such sale a State function.<sup>15</sup> These are the "monopoly" or "control" States. Distillers and manufacturers sell to these States on State terms. In all of the other States the sale is by private enterprise under State license, on conditions required to be met to qualify for State license and to retain such license.

Regulation is detailed and affects all aspects of operation in the license States. An aspect of such regulation in many States affects pricing, minimum and maximum as well. A price warranty, with the same purpose as our § 9, is a condition of distillers' selling to "monopoly" or "control" States (*supra*, p. 31).

Soon after Repeal various aspects of State regulation were challenged in the Courts. All were upheld by this Court. *Ziffrin, Inc. v. Reeves*, 308 U. S. 132, 138 (1939); *Indianapolis Brewing Co. v. Liquor Commission*, 305 U. S. 391 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395 (1939); *Mahoney v. Triner Corp.*, 304 U. S. 401 (1939); *State Board of Equalization v. Young's Market*, 299 U. S. 59; *Carter v. Virginia*, 321 U. S. 131 (1944).

An effort, some years after this group of cases, was made by the *State of California* to file a bill of complaint in this Court against the *State of Washington*, contending that Washington had erected trade barriers to sale of California wine within the State, thus violating the Commerce Clause, a violation which California contended was not sanctioned by the Twenty-first Amendment.

This Court's *Per Curiam* opinion in that case (358 U. S. 64 [1958]) disposed of the matter summarily, saying:

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<sup>15</sup> One of these, Wyoming, licenses private retailers, *supra* p. 31.

"The motion for leave to file bill of complaint is denied. U. S. Const., Amend. XXI, § 2; *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U. S. 391; *Joseph S. Finch & Co. v. McKittrick*, 305 U. S. 395; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *State Board of California v. Young's Market Co.*, 299 U. S. 59."

Just as does *California v. Washington* (*supra*), so do all of the above cited cases deny appellants' essential position that State liquor legislation must affirmatively promote temperance to come within the Twenty-first Amendment:

In *State Board v. Young Market Co.*, *supra*, the California statute which exacted a \$500. annual license fee for the privilege of importing beer from other States, obviously designed to protect local from foreign beer, was upheld.

In *Mahoney v. Joseph Triner Corp.*, *supra*, a Minnesota statute imposing requirements as to liquor imported from other States not imposed on liquor processed within the State, was sustained, the Court noting that the statute "clearly discriminates in favor of liquor processed within the State as against liquor completely processed elsewhere." (304 U. S. at 403.)

Held valid in *Indianapolis Brewing Co. v. Liquor Control Commission*, *supra*, and *Joseph S. Finch & Co. v. McKittrick*, *supra*, were retaliatory laws enacted by Michigan and Missouri respectively, which prohibited the importation or sale of beer manufactured in a State discriminating against beer produced in Michigan (*Indianapolis Brewing Co.* case) or Missouri (*Finch* case). In the *Indianapolis Brewing* case, the contention that the Michigan statute violated the due process clause was rejected. (305 U. S. at 304.)

In *Ziffrin, Inc. v. Reeves, supra*, a State statute confining the business of transporting liquor within the State to licensed common carriers was held valid against attacks of violation of the Commerce Clause, Due Process and Equal Protection.

In *Carter v. Virginia, supra*, the State statute upheld imposed rigid requirements upon those who transported through the State.

Patently the legislation upheld in these cases was not designed to promote temperance; there is no merit to appellants' argument that all liquor legislation must affirmatively promote temperance to be valid under the Twenty-first Amendment.

Appellants concede, as perforce they must (Br., p. 30), the above decisions of this Court which have held that the Twenty-first Amendment gives to the States total authority to regulate the sale of alcoholic beverages within their borders. Appellants seek to make capital (Br. pp. 31-34) of *United States v. Frankfort Distillers*, 324 U. S. 293 (1945), *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324 (1964) and *Department of Revenue v. James B. Beam Distillery Co.*, 377 U. S. 341 (1964).

These cases do not hold what appellants would wish they held. None diminishes the principle of *California v. Washington* and the decisions preceding it which this Court cites in that opinion.

The *Frankfort Distillers* case is one which it seems surprising that appellants should turn to. Defendants there, who included a number of the instant appellants (Footnote p. 293), were indicted for violation of § 1 of the Sherman Act. The United States Court of Appeals had reversed the District Court which had upheld the indictment. This



Court reversed the United States Court of Appeals and affirmed the District Court. The price-fixing conspiracy charged was interstate. Defendants there argued that the Twenty-first Amendment barred the prosecution. Mr. Justice BLACK, writing this Court's Opinion, said, without equivocation (p. 299):

"That Amendment [21st] bestowed upon the states broad regulatory power over the liquor traffic within their territories [citing *Carter*, *Ziffrin* and *State Board v. Young's Market*, *supra*]."

The Opinion upheld the power of the United States to prosecute because (p. 299):

*"The Sherman Act is not being enforced in this case in such manner as to conflict with the law of Colorado. Those combinations which the Sherman Act makes illegal as to producers, wholesalers and retailers are expressly exempted from the scope of the Fair Trade Act of Colorado, and thus have no legal sanction under state law either. We therefore do not have here a case in which the Sherman Act is applied to defeat the policy of the State. \* \* \*"* (Italics ours.)

Thus the premise on which the decision was based was that it was the States which have control over sales of liquor and the issue was, did this particular State law foreclose Sherman Act prosecution, not vice versa.

Mr. Justice FRANKFURTER wrote a concurring opinion, which added to what Mr. Justice BLACK's majority opinion had said (pp. 300-302):

"The Twenty-first Amendment \* \* \* [subordinated] rights under the Commerce Clause to the power of a State to control, and to control effectively, the traffic in liquor within its borders. \* \* \*

"As a matter of constitutional law, the result of the Twenty-first Amendment is that a State may erect any barrier it pleases to the entry of intoxicating

liquors. Its barrier may be low, high, or insurmountable. Of course, if a State chooses not to exercise the power given it by the Twenty-first Amendment and to continue to treat intoxicating liquors like other articles, the operation of the Commerce Clause continues. Since the Commerce Clause is subordinate to the exercise of state power under the Twenty-first Amendment, the Sherman Law, deriving its authority from the Commerce Clause, can have no greater potency than the Commerce Clause itself. It must equally yield to state power drawn from the Twenty-first Amendment. And so, the validity of a charge under the Sherman Law relating to intoxicating liquors depends upon the utilization by a State of its constitutional power under the Twenty-first Amendment. \* \* \*

"Thus the question in this case, as I see it, is whether in fact the policy of Colorado sanctions such an arrangement as the indictment charges. Such a policy may be expressed either formally by legislation or by implied permission. \* \* \* In the view I take of the matter, *if a State authorized the transactions here complained of, the Sherman Law could not override such exercise of state power. For, in any event, if state policy did so authorize it, conformity with the state policy could not be deemed an 'unreasonable' restraint of interstate commerce. But I do not find that Colorado has done so.*" (Italics ours.)

No more does *Hostetter v. Idlewild Bon Voyage Co.* support appellants. There the matter involved was wholly and purely an export operation at Idlewild International Airport (377 U. S. at pp. 325-6), so held by the United States Acting Commissioner of Customs.

This Court—Mr. Justice BLACK<sup>16</sup> dissenting in an opinion in which Mr. Justice GOLDBERG concurred (pp. 334-340)—held that this strictly foreign commerce operation did

<sup>16</sup> Mr. Justice BLACK wrote the prevailing opinion in *United States v. Frankfort Distillers, supra*.

not require a license under the New York Alcoholic Beverage Control Law.

Mr. Justice STEWART's prevailing opinion first said (p. 330):

"This Court made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders. \* \* \*

"This view of the scope of the Twenty-first Amendment with respect to a State's power to restrict, regulate, or prevent the traffic and distribution of intoxicants within its borders *has remained unquestioned*. See *California v. Washington*, 358 U. S. 64. \* \* \*" (Italics ours.)

The Opinion cited and discussed for this unequivocal affirmation of the State's "unquestioned" power over the traffic and distribution of intoxicants within its borders the cases we have cited *supra*. It made utterly clear what it meant by federal power over foreign commerce in liquor by explaining (pp. 333, 334):

"Here, ultimate delivery and use is not in New York, but in a foreign country. The state has not sought to regulate or control the passage of intoxicants through her territory in the interest of preventing their unlawful diversion into the internal commerce of the State. As the District Court emphasized, this case does not involve 'measures aimed at preventing unlawful diversion or use of alcoholic beverages within New York.' 212 F. Supp., at 386."

In *Department of Revenue v. Beam Distilling Co.*, *supra*, the third case upon which appellants rely, the Supreme Court had before it the question of a State tax on imported whiskey while it was in unbroken package prior to re-

sale or use by the importer. This Court held that this violated the Export-Import Clause of the Constitution.

The Opinion by Mr. Justice STEWART, so as to leave no doubt took pains to affirm once more the States' total authority over the distribution of liquor within their borders (p. 346).

"We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. *There can surely be no doubt, either of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use or consumption of intoxicants within her territory after they have been imported*" (Italics ours).

None of these three cases can lend any comfort to appellants' cause.<sup>17</sup> They all reiterate and reaffirm the States' authority to regulate sale of liquor within its borders, which makes valid a State enactment such as § 9.

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<sup>17</sup> Discussion of these cases in the New York Court's Opinions in the instant case; 16 N. Y. 2d, p. 58; 23 N. Y. A. D. 2d, p. 934.

## POINT II

Control of maximum prices is a proper exercise of the police power. Section 9 thus being an enactment under the police power, the Legislature had the greatest leeway in determining the measure and method of effectuating its police power purpose for the protection of the People of the State from economic disadvantaging at the hands of an industry.

A State is not required to gear its police power measures to the merchandising maneuvers in which the industry affected engages for its profit. It is on such that appellants base their contentions of difficulty of compliance and their due process argument. Moreover their contentions are sheerly conjectural and speculative and are in fact contradicted by the pricing operations which obtain in the industry in and outside New York State.

The merchandising practices of the industry in New York State self-evidently support the need for Section 9 and its application to those whom it covers.

### A. Control of maximum prices is a proper exercise of the police power.

Statutory regulation of pricing by private industry which by various formulae places a maximum on prices, is an approved exercise of the State Police Power. This Court has upheld such State statutory regulations on a variety of products and services far removed from the necessities of life. For example:

*Gold et al. v. DiCarlo et al.*, 380 U. S. 530 (1965) aff'g 235 F. Supp. 817, 820-1 (Three-Judge District Court, S. D. N. Y.) upheld the New York statutory provision (General Business Law § 169-c) fixing the limit which a theatre ticket broker may charge for theatre tickets above the price

printed on the ticket (The law makes violation a misdemeanor).

*Olsen v. Nebraska*, 313 U. S. 236 (1941) upheld a State statute fixing fees of private employment agencies;

*Townsend v. Yeomans*, 301 U. S. 441 (1937) upheld a State statute fixing maximum charges for handling and selling leaf tobacco;

*Nebbia v. New York*, *supra*, 262 N. Y. 259, aff'd 291 U. S. 502 (1934) upheld the New York statute authorizing the fixing of a maximum as well as a minimum price of milk;

*O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251 (1931) upheld a State statute limiting commissions of agents of fire insurance companies.

The criterion of long ago which required a business to be "affected with a public interest" before its pricing could be the subject of regulation by State statute was discarded 30 years ago (*Nebbia v. New York*, *supra*, 291 U. S. at pp. 531-539), whatever it once was deemed to mean more than that "an industry" "is subject to control for the public good" (*id.* p. 536).

Appellants (Br., p. 54) agree that State legislation fixing "maximum price limitations" is upheld "because of industry abuses which can only be corrected by this device". They cite *Gold et al. v. DiCarlo*, 380 U. S. 520, *supra*, the theatre ticket case, as an example. If ever there were inundating evidence "of industry abuses" which called for maximum price legislation, the liquor industry pricing in New York State is it (*supra*, pp. 14-18, 28-31; *infra*, pp. 54-57).

Controlling maximum prices where necessary for the protection of the public is the public policy in New York

State (e.g., General Business Law §§ 185, 169-c; Insurance Law §§ 180, 184-c, 186, 255[2]) and New York is not isolated in following such policy. It is at one with the police power, state and federal, to protect the consumer from being the victim of the vendors of the products it buys, be they necessities, comforts or even luxuries. Cf. *Head v. New Mexico Board*, 374 U. S. 424 [1963], *infra*. Government's effectuation of this policy is accomplished in a variety of ways, maximum mark-ups, approved prices, and so on.

In fact, by § 9 New York has not imposed upon appellants a maximum selling price or a maximum mark-up or a maximum profit as do some State liquor laws. South Carolina imposes on liquor wholesalers and retailers a maximum percentage mark-up over cost (South Carolina Code, Vol. I, p. 312, §§ 4-72). Minnesota permits the regulatory body to fix the maximum wholesale liquor prices (Minnesota Statutes § 340.09). New Mexico prohibits fair trade contracts in the sale of liquor which give wholesalers more than a specified percentage profit (New Mexico Statutes §§ 46-9-5, 46-5-6). Section 9 on the other hand left the liquor industry complete freedom in pricing in New York, with one restriction: that they charge in New York no more than the price for which they—seemingly—can profitably sell their products elsewhere. They are free to charge more elsewhere or less in New York. They are *not* required to *match* in New York their price elsewhere.

The statutory provision attacked here is one regulatory provision over an industry historically regulated; currently regulated in every State of the United States. "The regulation of the liquor traffic is one of the oldest and most untrammelled of legislative powers" (*Goesaert v. Cleary*, 335 U. S. 464, 465 [1948]).



Indeed, the business has, in the 17 "monopoly" States, been taken from the hands of private industry and made a function of the State.

Private liquor wholesalers—one group of appellants in the instant action—are non-existent in those States. Distillers—one group of appellants in the instant action—do business in those States with the State government on State terms. These terms include a provision such as that of § 9. (In the "monopoly" States the warranty does not cover wholesalers—because there are no wholesalers.) If it were beyond the power of New York to make this a regulatory requirement by statute, it would be beyond the power of the "monopoly" States to exact it by contract. If it is possible for appellants to comply with such a requirement because they choose to do so by contract, it is possible for them to comply with it under our statute. Obviously appellants accept the "monopoly" States' conditions in order to sell to them.

But the constitutionality of our statute is not to be determined by appellants' willingness to comply in the monopoly States because they deem they have no alternative, but conjuring up arguments in opposition because in New York they have a sellers' market with not one but a multitude of customers.

In *California Auto Association v. Maloney*, 341 U. S. 105, 110, this Court (by Mr. Justice DOUGLAS) said:

"Here \* \* \* the power of the state is broad enough to take over the whole business, leaving no part for private enterprise. *Mountain Timber Co. v. Washington*, 243 U. S. 219; *Osborn v. Ozlin*, *supra*, [310 U. S. 53] p. 66. The state may therefore hold its hand on condition that local needs be serviced by the business."

Or to apply this principle to the instant situation "on condition" that the people of the State be not prejudiced economically by the pricing practices of this business.

Appellants, with fine disregard for their contradictory position that Section 9 would cause them infinite economic harm by curtailing their sales in New York, insist on their opinion that § 9 would not promote temperance and that this is the whole purpose of liquor sale regulation especially of the New York ABC Law. This is answered not only by the fact that it was found in 1964 that high prices have not in fact promoted temperance (*supra*); not only by the fact that appellants' views as to whether § 9 will or will not effect temperance are irrelevant; not only by the other purpose of the New York Beverage Law § 2 (the "protection" and "welfare" of the people of the State), but by the fact that authority for an exercise of the police power need not be found in the purpose provision of the comprehensive regulatory statute governing an industry; that the Legislature had authority to adopt this enactment under its "inherent" police power.

The police power encompasses all facets of community needs and is not limited, as appellants would suggest, to the protection of the physical welfare of the public. It encompasses protection of the people from "economic menace" to the general welfare, from economic disadvantaging at the hands of business (*Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 427 [1937]; *Beauharnais v. Illinois*, 343 U. S. 256, 262 [1952], and see *infra*). It is a flexible power, adaptable to and extended with developing concepts of the areas of government's duty to the people and of areas of need for government intervention on behalf of the people. "Notions of public policy" which once obtained as to what interests of the people government may protect, are not to be given "continuing vitality as

standards by which the constitutionality of the economic" statutes "of the states is to be determined" (*Olsen v. Nebraska*, 313 U. S. 236, 247 [1941]; *Ferguson v. Skrupa*, 372 U. S., *infra*, 726 [1963].) *Supra* this subpoint specifically as to maximum price control.

Appellants are strong in their opinion (Br. p. 66) that Section 9 will not serve to remedy evil it was designed to remedy. (They describe it as "purported" evil.) Whether it will or not accomplish its purpose, this Court has said, is not for the judiciary, nor for those challenging a law, but for the Legislature.

"Choice of policy," "trial-and-error" is left to the Legislature in fulfilling its responsibility (*Beauharnais v. Illinois*, 343 U. S. 250, 262 [1952]).

The doctrine is, as expressed by Mr. Justice BLACK writing for this Court in *Ferguson v. Skrupa*, 372 U. S. 726 (1963) (at pp. 730-1):

"courts do not substitute their \* \* \* economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned \* \* \* with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.' [quoting from *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U. S. 525, 536 (1949).]"

As this Court said in *California Auto Assn. v. Maloney*, 341 U. S. 105, 110 (1951):

"Whether \* \* \* [a state's] program is wise or unwise is not \* \* \* [a judicial concern]. See *Olsen v. Nebraska*, 313 U. S. 236; *Lincoln Union v. Northwestern Co.*, 335 U. S. 525. The problem is a local one \* \* \*."

See also *Sproles v. Binford*, 286 U. S. 374, 388.

Appellants declare that the law is unreasonable; that wholesalers are under no "legal obligation" to give information to distillers as to their prices or the quantity of business that they do in a particular distillers' brand (Br. p. 62). Perhaps the practicalities are more effective than a "legal obligation", for we see (*supra*; *infra*), somehow the distillers do know both their wholesalers' prices and the quantity of the distillers' product the wholesalers sell.

Appellants to illustrate their argument that Section 9 is unreasonable, take the strange method of imagining possible devious utilization of it to depress prices in New York.

They evoke (Br., pp. 63-4, 65) a "blackmailing" wholesaler, a "reprehensible", "vindictive" wholesaler in "Chicago", with extortionist hands around the throat of a giant distiller breaking its prices in New York and destroying its New York wholesalers. This can hardly be taken seriously. We venture to say that appellants have never encountered such a one and do not expect to. ("Characteristics of the Industry" *supra*.)

They also pose a possible scheme by a "collusive" distiller (Br., p. 65). This "collusive" distiller could, they can see, conspire with an out-of-State wholesaler (Br., p. 65) to

"sell the brands of the distiller's competitor at prices so low as to prevent the competitor from being able to market his brands in New York. The collusive distiller would then enjoy a marked competitive advantage in New York for the period his competitor was

faced with the dilemma of selling at a severe loss in New York or not selling at all and risking the loss of his New York market. That such a fantastic spectacle is without the bounds of reason can hardly be questioned."

To this we might say that any distiller bent upon entering into a collusive agreement with a wholesaler to depress the price of a competitor's brand in New York State did not have to wait for Section 9 for help. He could if so inclined conspire with a wholesaler or wholesalers right in New York State today though the operation of § 9 is stayed.

We would also suggest that if distillers have the kind of control over wholesalers that their imagined situation describes, they can have no trouble in obtaining related wholesalers' prices of the distillers' own brands.

Above all the possibility of the kind of utilization of the statute for devious purposes which appellants envision—and there is little that is immune from unethical misuse—does not assuredly render a statute unconstitutional as "unreasonable" or on any other ground.

An enlightened exercise of the police power to protect the consumers of the product of a powerful industry which practices an old time control over the pricing of its product from manufacturer to consumer produced this statute. As Mr. Justice DOUGLAS wrote in *Williamson v. Lee Optical Co.*, 348 U. S. 483, 488 (1955):

"The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. See *Nebbia v. New York*, 291 U. S. 502; *West Coast Hotel Co. v. Parrish*, 300 U. S. 379; *Olsen v. Nebraska*, 313 U. S. 236; *Lincoln Union v. Northwestern Co.*, 336 U. S. 525; *Daniel v. Family Ins. Co.*,

336 U. S. 220; *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421."

In *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 423 (1952), Mr. Justice DOUGLAS had said:

"the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare \* \* \*"

**B. That a statutory enactment for the benefit of the People may have a burdensome impact or be a financial detriment to the industry it affects does not render it unconstitutional.**

Appellants argue that there would be difficulties in complying with the statute and adverse financial effects.

First, of course, an exercise of the police power for the benefit of all the people overbalances and is not rendered invalid because its effect would be to cause expenses or be financially detrimental to those whom it restrains. (*California Auto Assn. v. Maloney*, 341 U. S. 105, 111 [1951]; *Day-Brite Lighting, Inc. v. Missouri*, 342 U. S. 421, 424 [1952]; *Standard Oil Co. v. Marysville*, 279 U. S. 582, 586; *Fox v. Standard Oil Co.*, 294 U. S. 87, 102; *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 170, *Sproles v. Binford*, 286 U. S. 321, 388-389). Moreover, the difficulties appellants envision are created of conjecture and speculation. This is obviously so because their litigation has prevented the statute from ever going into effect. The picture they draw of problems they would encounter in compliance at times borders on the fanciful and at times goes into the dramatic, as we have seen (*supra*, p. 47).

In any case on the most serious speculation and conjecture of their burdensome results, laws are not held unconstitutional. Courts do not join in such speculation "upon the nature or extent of the burden" and "make pro-

nouncement" thereon. (*Federation of Labor v. McAdory*, 325 U. S. 450, 469 [1945].)

Moreover, appellants' arguments of difficulty in complying are entirely arguments of the effect on their profits. This is the thesis which crops up on page after page of appellants' brief. All of their arguments are based on their present merchandising methods and techniques to stimulate their sales.

As this Court said in *California Auto Association v. Maloney*, 341 U. S. 105, 111, *supra*:

"Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dignity of a taking in the constitutional sense."

Our statute is under New York's police power for the benefit of all the People. New York is not required to gear such law to appellants' profit motive and merchandising techniques born of that. (*Fox v. Standard Oil Co.*, 294 U. S. 87, 102 [1935]; *Hegeman Farms Corp. v. Baldwin*, 293 U. S. 163, 170 [1934]; *Sproles v. Binford*, 286 U. S. 374, 389 [1932].)

Appellants seemingly are concerned that upholding this law would be an invitation to legislation in other States inimical to their interests. If that would transpire, so be it. Before this Court is the issue of the validity of *this* law.

Appellants' conjecture and speculation of difficulties in complying are contradicted by the realities ("Characteristics of the Industry", *supra*).

We comment first on appellants' protests of such difficulties in respect to the distillers' own prices to wholesalers, curious as such argument is.



Promotional devices to which they resort in other States to stimulate sales appellants argue would confront them with difficulties in complying with § 9 since under the section New York prices would be required to be no higher than the lowest price outside the State though that price is not a flat simple price, but is reached by incentive programs to spur the wholesaler or retailer to push up the sales of the distiller's brand.

It is to be remembered that as to prices in the 17 Monopoly States, there would be no problem at all. There is a unit within the larger distiller companies devoted exclusively to Monopoly State sales which has the information as to selling prices to those States at its fingertips. In some of these States, for example, Pennsylvania (Phillips' Affidavit for Defendants, R. 313), distillers are required to have their prices reflect promotional allowances in other States.

If the distillers can have or obtain such information for any State, they can do so for New York. In the Monopoly States the problem would appear to be more difficult than in New York, since in those States the warranty must be of no higher prices than the lowest price in other States *at the time of sale* to the Monopoly State. In New York it would be as to the prices in other States in a preceding month. Seemingly distillers solve the problem for the Monopoly States, whether by allowing a round figure in the Monopoly State prices to take care of discounts, allowances, etc. in other States, or otherwise. They solve it.

Finally, essentially the distillers know the lowest price for which they sell their brands. Their promotional techniques may be to charge that lowest price, now here, now there, to increase sales at one place or another, but the lowest price for which they will sell a brand they know

(Street deposition in *Laird v. Gage, supra*; testimony of Robert W. Coyne, President, Distillers Spirits Institute, before joint legislative committee for study of alcoholic beverage control [Ex. C to plaintiff's order to show cause] R. pp. 49-50). This is all they need to know for Section 9.

We come then to the prices to retailers by related wholesalers.

All that has been said as to determining distillers' prices<sup>18</sup> outside New York State obtains as to wholesalers' prices. On the matter of knowledge by the brand owner of wholesale prices of its brands throughout the country, this is, as we have seen, an Industry marked by unique discipline. We have seen *supra* (Lind Affidavit for Plaintiffs, R. 59-60) how very much in minute detail the distillers know about the business of their distributor. The brand owners, thus, are fully aware of how their brands are faring<sup>19</sup> and how they are being handled by the limited number of related wholesalers to whom their brands are entrusted.

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<sup>18</sup> They must have their prices all over the United States months in advance of the prices being in effect. The existence of so many State price posting or filing requirements makes it essential that there be precision in projecting prices in advance—a month, two months or three months in advance. Because there are among these States minimum price requirements, minimum mark up requirements, maximum price requirements, there must be exactitude in projection of prices.

<sup>19</sup> This computerized age will ease any problems. Business Week for September 25, 1965 in its section "Marketing Briefs" has an item entitled "Schenley gets instant market information from computerized video data system." The article starts with the following: "By punching some buttons and looking at a desk-top video screen, executives of Schenley Industries now can tell 'instantaneously' how their company's wines and spirits are selling all over the country."

It goes on: "The 3½-in. by 4½-in. screens can flash combinations of up to 3-million bits of information stored in the computer,

(Footnote continued on following page)

We have seen *supra* ("Characteristics of the Industry") that generally wholesale prices apparently are at least suggested by the distillers. It therefore would seem that they know the wholesale prices of their brands everywhere without inquiring. For that reason, and because it strains credulity to accept that the wholesaler who has an exclusive franchise in a brand or who does the substantial portion of his business in a distiller's products, will risk the chief bulwark of its business by defying an inquiry as to prices from the distiller, the distiller knows the running prices of its brands at all times.<sup>20</sup> And see *infra* as to the solution of the occasional particular problem in making an affirmation.

We are reminded again that § 9 does not require matching prices with other States; it does not ask that the prices in other States be stated. It merely asks that New York prices be *no higher*.

Not only is it known to all who are acquainted with the Industry that the brand owners know in advance the whole-

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(Footnote continued from preceding page)

showing how a brand is doing in any or all sizes in any market, city, state, or national; at any or all of the over 400 distributors; sales for each month or the year to date, compared to earlier periods; prices and, eventually perhaps, figures on competing brands.

"Information also is beamed over two larger, 23-in. monitors for group viewing, and is printed in more conventional 'hard' form by teletype machines. Data on prices and orders are fed in daily, and on sales and inventories monthly. \* \* \* the system will save 2½-min. to 35-min. on simple tasks, and up to three or four hours on complicated ones." That is it will make even more instantly available information already constantly available.

<sup>20</sup> Appellants also speak of the related person wholesaler in New York being bound by the related person wholesalers' prices in another State. They are, as we saw above, generally bound by distiller suggested prices, so that as a practical matter nothing is changed. These wholesale prices tend to be uniform throughout a State irrespective of wholesalers' costs of operations as between metropolitan areas and smaller communities. See *infra*.

sale prices of their products and have a role in determining these prices, but were this not known, it would be a rational inference from the minimum consumer resale price provisions in the statutes of many States. In some States there are also minimum wholesale price provisions (Moreland Commission Report #3, Appendices A and B, pp. 32-34).

For the latter States, wholesale prices unquestionably are known.

Reasoning from the retail prices which are fixed mainly by the distiller under the statutes, and in "Fair Trade" contracts by distillers as in New York in this last year (*supra* p. 21), necessarily they are fixed with the retailer's mark up a consideration. For that mark up, the wholesaler's price must be the base. Thus the distiller's voice is heard in respect to the wholesale price; the wholesale price is known to the distiller.

### **The Marketing and Pricing Situation in New York**

The present marketing and pricing situation in New York is eloquent of the knowledge distillers have to enable them to comply with § 9, as to wholesalers' prices and by the same token of the practices which indicated the need for the provision in section 9 covering related wholesalers as well as brand owners prices.

What we note here is found in New York price schedules filed with the State Liquor Authority and in trade publications in this and other States.

#### *Restricted wholesaling*

In New York State, as elsewhere except in the rare State where this may be forbidden ("Characteristics of the In-

dustry", *supra*), distillers typically restrict the wholesalers through whom they sell their products. Some wholesalers have the distribution of all of a distiller's brands, some of only a single brand or a few brands. Distillers include the names of their restricted wholesalers with the brands they are authorized to distribute as part of their price schedules filed with the New York State Liquor Authority.

The same wholesaler, with few exceptions, is not given distribution by the giant distiller of their brand of the same class—price class—if it handles the same price class brand of another of the giant distillers.

This merchandising practice is of course not required by New York law. It is the distillers' own merchandising practice and one which seemingly by common consensus the major distillers follow.

#### *Wholesale prices.*

In New York the statutory provisions in respect to liquor prices prior to the 1964 statute were that (a) minimum consumer resale prices were fixed by the distiller (Alcoholic Beverage Control Law § 101-c<sup>21</sup>); (b) a distiller could not discriminate in prices as between the wholesalers to whom the distiller sold, nor could a wholesaler discriminate in prices as between the retailers to whom the wholesaler sold (§ 101-b [2, a]).

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<sup>21</sup> It is not at all contradictory as appellants suggest (Br. pp. 28, 49), that § 9 was enacted while the Legislature continued to allow Feld-Crawford to cover liquor retail sales when the state enforced minimum consumer resale price provision was repealed. On the contrary, the Legislature realizing that there could be agreements under the comprehensive Feld-Crawford Act, enacted § 9 with the purpose that Feld-Crawford agreements would be at lower prices to consumers if retailers and wholesalers were paying lower prices for liquor to their suppliers than they had been in the past.

But there was nothing in the law which directed or in any way inhibited the freedom of each wholesaler in its prices to retailers—just so its price to retailers was the same for all to whom it sold.

Apparently, however, somewhere there has been influence on the wholesalers' prices to retailers. Because in any given month wholesalers in New York City—and in the State—typically charge the same price to the penny for the same brand.<sup>22</sup> The wholesale schedules of prices filed with the State Liquor Authority reflect this—month after month, year after year.

We look at some filed price schedules and price advertising of the products of some of the plaintiffs in this action, Seagram, Hiram-Walker, National Distillers. We take some of Seagram's products, for example. Seagram's Vice-President and General Counsel, Mr. Frederic J. Lind, submitted the lead affidavit on behalf of the appellants in the instant case on inability to comply. The advertised wholesale price of their well known brands, 7 Crown, Four Roses, Seagram's V. O., Wilson's That's All, by every wholesaler in New York City and the wholesale price in their monthly filed price schedules all over the state including upstate New York in December 1964, in every month of 1965 and right through January 1966 has been exactly the same. (All this after Section 101-c,

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<sup>22</sup> Appellants profess concern for New York State wholesalers whose operating costs—they say—may be higher than in another state. This is another of their specious arguments. Because for one thing the sales volume being larger in New York total income is larger. Secondly operating costs are necessarily higher in some areas of New York State than in others, as they are in different parts of all states. But somehow wholesale prices tend to be similar in all parts of a given state. Finally, the prices wholesalers pay for their products would be lower by reason of § 9.

the minimum consumer price provision was no longer in effect.) The advertised wholesale price<sup>23</sup> and the filed monthly wholesale prices for Hiram Walker products (Canadian Club and Imperial) was exactly the same in December 1964, in every month of 1965 and in January 1966 by its subsidiary in New York City through whom it distributes to retailers in New York City and also by its wholesalers upstate. The same is true of National Distillers (affidavit of Mr. R. R. Hermann, Jr. in this action). It is interesting that National Distillers wholesaler in Buffalo and Rochester which adhered to the same wholesale price is McKesson & Robbins. This sheds interesting light on their affidavit in this case (R. 199).

In fact Beverage Media (and other journals of this type) carry a Price and Brand Index with the wholesale price of each brand. The wholesale prices for the brand advertised by each wholesaler tends not to deviate from the prices listed in this Index.

Patently, the free enterprise for which appellants argue so vehemently in their brief has not in this Industry operated in New York State. To sum up:

- 1) the minimum consumer resale prices permissible and enforced under § 101-c remained at such high level—among the highest in the nation;
- 2) the wholesaler to retailer prices of all wholesalers for the same brand within a geographic area of the State and even generally throughout the State, have tended to be uniform—and high.

The need for § 9 is self-evident.

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<sup>23</sup> *Beverage Media, Metropolitan Edition.*



**C. As to appellants' "vagueness" argument.**

Appellants conjure up a variety of professed worries on the subject of what would be regarded as a "related wholesaler"; as to what is meant by the word "substantial" in the definition of related person. This is their argument that the statute is "intolerably vague" (Br., p. 66).

As appellants themselves recognize (Br. p. 38), the federal antitrust acts use the phrase "to substantially lessen" competition. Yet these acts have never been held unconstitutional because the phrase is not defined. The rule of reason in the context of the acts and their purpose has obtained in finding what conduct came within the law and what did not. The Robinson-Patman Act also declares it unlawful to discriminate in price where the effect of such discrimination may be "substantially to lessen" competition. That act too has not been held unconstitutional because the phrase has not been defined. Again the rule of reason has been used in applying it.

As the New York Supreme Court (45 Misc. 2d at p. 956) said in respect to the "vagueness" argument, legislation is and often must be enacted in broad outline leaving to administrative officials the duty of determining "facts and conditions" upon which the operation of a statute depends.

In *Board of Governors v. Agnew*, 329 U. S. 441 (1947), the meaning of the phrase "primarily involved" was at issue and the question became whether if "primarily" connotes "substantiality", the statutory provision involved was sufficient.

This Court said:

"But we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable

so as to survive challenge on the grounds of unconstitutionality. *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 397-400; *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 142-146; *Yakus v. United States*, 321 U. S. 414, 424-428; *Bowles v. Willingham*, 321 U. S. 503, 512-516." (329 U. S. at p. 449.)

See also, e.g., *New York Central Securities Corp. v. United States*, 287 U. S. 12, 24 where the phrase "public interest" was held an adequate standard; and *National Broadcasting Corp. v. United States*, 319 U. S. 190, 225-226 (1943); *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 285 ("public convenience, interest or necessity"); and see *Sproles v. Binford*, 286 U. S. 374, 393.

Be it remembered that the federal anti-trust acts all contain criminal penalties. Appellants here express trepidation about innocent failure to have all information or accurate information in making the affirmations since a false affirmation is declared by the statute to be a misdemeanor. Of course only if it is proven that an affirmation were made with knowledge that a statement therein is false would it constitute a misdemeanor. The statute is to be construed as so requiring (*Morissette v. United States*, 342 U. S. 246, 250 *et seq.*).

Section 9 seeks the lower price in New York—not to prosecute the industry. It of course would only be a course of conduct, indicating knowingly making false affirmations that would induce the State Liquor Authority to initiate a prosecution. The State Liquor Authority knows and plaintiffs know that falsification in the affirmations with knowledge that the statements made are untrue, would have to be proven beyond a reasonable doubt for prosecution.

"That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold

the language [of a statute] too ambiguous to define a criminal offense." (*U. S. v. Petrillo*, 332 U. S. 1, 7).

"Statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within the language." *U. S. v. National Dairy Corp.*, 372 U. S. 29, 32 (1963).

See also, *U. S. v. Wurzbach*, 280 U. S. 396, 399.

**D. The equal protection argument is without basis because there is readily discernible reason for the scope of coverage of § 9.**

All that need be said in answer to appellants' argument (Br. Point V) of denial of equal protection in that neither non-related persons, private brands or wine are covered by § 9, is that it is easy to see why they were not.

"Private brands" have always been excluded from provisions of the Alcoholic Beverage Control Law which apply to "brand" liquors (§ 101-b, former ¶ "e" of subd. 3).

Wine has always been dealt with specially in the Alcoholic Beverage Control Law (Article 6 "Special Provisions Relating to Wine").

The source of control over liquor prices was found to be the distillers (*supra*, pp. 24-31). Control over pricing by wholesalers not related to the distiller would not be the same as over related wholesalers. Therefore, non-related wholesalers are not included in § 9.

To exclude all of these is therefore constitutionally permissible classification.

"Exact equality is no prerequisite of equal protection of the laws within the meaning of the Fourteenth Amendment."

*Norvell v. Illinois*, 373 U. S. 420, 423 (1963).

"The Constitution does not require things which are different in fact *or opinion* to be treated in law as though they were the same." (Italics ours.)

*Tigner v. Texas*, 310 U. S. 141, 147 (1940).

That others who might have been included in a statute were not, does not render a statute unconstitutional.

*United States v. Carolene Products Co.*, 304 U. S. 144, 151;

*Williamson v. Lee Optical*, 348 U. S. 483, 489 (1955).

### POINT III

Were the subject of Section 9 a product other than liquor (and thus the Twenty-first Amendment not determinative), Section 9 does not interfere with interstate commerce; the Sherman Act and Robinson-Patman Act are irrelative to Section 9 and appellants' supremacy clause argument accordingly fails.

Even if this were not State regulation of the sale of liquor, the statute is not in violation of the Commerce Clause, or of the Sherman Act or of the Robinson-Patman Act.

Contrary to the impression appellants' argument seeks to create, the Commerce Clause does not render invalid State laws whose mere existence might have a remote influence in other States.

If that were not so, much legislation in more enlightened States affecting industries which operate nationally would be unconstitutional simply because of what other States might do or not do or permit or not permit. This is

appellants' argument of the influence § 9<sup>24</sup> may have in other States.

(A)

**As to Appellants' Interstate Commerce Argument.**

The Interstate Commerce Clause does not have any such reach as appellants would give it.

As Mr. Justice FRANKFURTER said in *Osborn v. Ozlin*, 310 U. S. 53, 62 (1940):

"\* \* \* the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. *The mere fact that state action may have repercussions beyond state lines* is of no judicial significance so long as the action is not within that domain which the Constitution forbids." (Emphasis supplied.)

In another opinion *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940) upholding a Wisconsin tax, Justice FRANKFURTER wrote (pp. 444-445):

"The substantial privilege of carrying on business in Wisconsin, which has here been given, clearly supports the tax, and the state has not given the less merely because it has *conditioned* the demand of the exaction upon *happenings outside its own borders*." (Italics ours.)

The State police power is if anything greater than State taxing power.

Among the host of opinions to the same effect as *Osborn v. Ozlin* and *Wisconsin v. J. C. Penney Co.*, see *Hoopeston v. Cullen*, 318 U. S. 313, 320-321 (Mr. Justice BLACK, 1943);

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<sup>24</sup> Plaintiffs' argument (Br. Point VI) concerning subdivision 3(a) of § 7 we have dealt with *supra*, pp. 3-4, 23-24.

*Atlantic & Pacific Tea Co. v. Grosjean*, 301 U. S. 412, 426-427 (1937). The "repercussions" of one State's laws upon the activities of a business which operates nationwide is "a consequence of modern practice of conducting wide spread business activities throughout the United States" (*Watson v. Employers Liability Corp.*, 348 U. S. 66, 72, 73 [Mr. Justice BLACK, 1954]). Each State in which such businesses operate may without violating the Interstate Commerce Clause adopt laws affecting them on matters of local concern even where in doing so interstate commerce is in some measure affected.

"There is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even to some extent, regulate it [citing cases] \* \* \* *when the regulation of matters of local concern is local in character and effect, and its impact on national commerce does not seriously interfere with its operation, \* \* \* such regulation has generally been held to be within state authority* [citing cases]."

(*Southern Pacific Co. v. Arizona*, 325 U. S. 761, 767 [1945]; emphasis supplied.)

"Legislation in a great variety of ways may affect commerce \* \* \* without constituting a regulation of it within the meaning of the constitution."

(*Huron Cement Co. v. Detroit*, 362 U. S. 440, 444 [1960].)

The Court in the *Huron* case cited the "teaching" of the Supreme Court's decisions to which appellants in this case do violence in their arguments of constitutional invalidity (Br. Points II, III, IV):

The "*teaching of this Court's decisions*", said Mr. Justice STEWART, "*enjoin seeking out conflicts between state*

and federal regulation where none clearly exists" (*id.* 362 U. S. at p. 446).

The argument appellants make here as to problems they would have if other States were to enact similar or conflicting statutes, was likewise made in the *Huron* case. The Court there simply noted that appellants had pointed to no "competing or conflicting" regulations (*id.* p. 448). It would not, however, have been an effective argument had there been such showing (*Watson v. Employers Liability Corp.*, 348 U. S. 66, 72 [1954]).

Even in the field of operation of a radio station, which is under the regulatory jurisdiction of a federal agency, the Federal Communications Commission, this Court unanimously held (Mr. Justice STEWART writing the opinion for the Court, Mr. Justice DOUGLAS concurring in the result and Mr. Justice BRENNAN writing a concurring opinion), in *Head v. New Mexico Board*, 374 U. S. 424, 1963 that a State statute could restrict certain occupations from advertising and thus restrict the radio station from accepting and broadcasting such advertisement.

"Without doubt the appellants' radio station and newspaper are engaged in interstate commerce", said the Court (p. 427).

"Unquestionably" enjoining this advertising "imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce" (pp. 427-8).

"A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way" (p. 429).

The Court added that it could not find

"that the legislation impinges upon an area of interstate commerce which by its nature requires uniformity of regulation" (p. 429).



The same is true of the instant case. Undoubtedly, the radio station in the *Head* case could accept in other states the advertising which the State statute involved in the action (New Mexico) restricted, and indeed could undoubtedly broadcast the same advertisement in another state within its broadcast range which it could not accept in New Mexico. Moreover, the radio station was licensed by a Federal agency which had detailed jurisdiction over it including the content of radio advertising (374 U. S. 436, 437). Another Federal agency, the Federal Trade Commission, has jurisdiction over false, misleading or deceptive advertising designed for radio broadcast, 374 U. S. at p. 441.

Nevertheless, this Court held that all this did not displace State regulation (374 at p. 442). The subject matter, held this Court, was not one admitting "only of national supervision."

The State statute in the case, said Justice BRENNAN at p. 445 is one

"designed principally to protect the State's consumer's against a local evil by local application."

Such legislation, said the opinion, concerned

"with the \* \* \* protection [of consumers] against fraud and deception embodies a traditional state interest of the sort which our decisions have consistently respected."

"Nor is such legislation required to yield", said Justice BRENNAN, even though "it may in some degree restrict the activities of one who holds a federal license." 374 at p. 445.

This decision upheld a State police power statute restricting the operation in one state of (1) a federal licensee (2) policed by two Federal agencies and (3) un-

questionably operating in interstate commerce. It assuredly requires rejection of the argument of appellants here that Section 9 violates interstate commerce or is invalid by reason of the supremacy clause. For their arguments to prevail this Court would, we submit, be required to withdraw its decisions which have "consistently respected" the "traditional state interest" in legislation protecting the interest of the consumers of the State (*cf.* 374 U. S. at p. 445).

Appellants (Br. p. 48) cite *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935). But as Justice CARDOZO, who wrote the opinion, said of the case when distinguishing it in *Henneford v. Silas Mason Co.*, 300 U. S. 577, 585 (1937), "the case is far apart from this one." So is *Seelig* "far apart from" the present case.

The *Seelig* case barred milk dealers buying milk outside New York from selling in New York unless they had paid for the milk in the other State the price they would have to pay for it in New York. This is the exact opposite of § 9, the statute here. The statute in *Seelig* (see Justice CARDOZO's summary in *Henneford* [300 U. S. at pp. 585-586] of his opinion in *Seelig*) directed what shall be done in other States; § 9 directs what appellants shall do in New York State.

The principle which sustains § 9 is, as Justice CARDOZO said in *Henneford* (at p. 587):

"A state, for many purposes, is to be reckoned as a self-contained unit, which may frame its own system of burdens and exemptions without heeding systems elsewhere."

See further, for example, *California v. Thompson*, 313 U. S. 109, 113 (1941); *Parker v. Brown*, 317 U. S. 341, 360 (1943).

We conclude this subpoint with the following footnote in *Hostetter v. Idlewild Liquor Corp.*, 377 U. S. at p. 331 *supra*:

“Quite independently of the Twenty-first Amendment, the Court has sustained a State’s power, within the confines of the Commerce Clause, to regulate and supervise the transportation of intoxicants through its territory.”

(B)

**As to Appellants’ Sherman Act and Robinson-Patman Act Arguments**

Appellants, since of course there is no federal statute on the subject of § 9, seeking to spell out a supremacy clause argument, do so by a series of steps. They turn to the Sherman Act and the Robinson-Patman Act. But they find that they require something more, because § 9 is not on the same subject as either the Sherman Act or the Robinson-Patman Act. Therefore, they argue that § 9 is not in accord or parallel with the policy of these two laws (Br. Point II).

Once more we recall that conflicts between state and federal regulation should not be sought where “none clearly” exist (*Huron Cement Co. v. Detroit*, *supra*, 362 U. S. at p. 446).

A State statute is not “displaced” “when the possibility of conflict with federal policy” is “remote”. Such “potential conflict is too contingent” too remote to require “a hands-off directive to the states”; to a State seeking to bring what in its judgment is equitable non-discriminatory consumer prices to its people (*International Association of Machinists v. Gonzales*, 356 U. S. 617, 621 [1958]).

The question is, as Mr. Justice BLACK wrote in *Hines v. Davidowitz*, 312 U. S. 52, 67, whether the State law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives" of the federal law with which it is alleged it conflicts.

What "obstacle" can a State law requiring all distillers and their related wholesalers to charge in the State no higher than the lowest prices they charge outside the State, present to operation of the Sherman Act or of the Robinson-Patman Act?

As this brief is being written, this Court on its last decision day, January 31, 1966, issued its opinion in *Brotherhood of Locomotive Engineers et al. v. Chicago R. I. & P. R. Co. et al.*,<sup>25</sup> in which the argument was made that the Federal government had actually pre-empted the field primarily through a 1963 Federal law so as to render unconstitutional State statutes fixing requirements as to railroad "crew consists" for interstate railroads when operating within the State. Mr. Justice BLACK writing for the Court said (quoting from *Missouri Pac. R. Co. v. Norwood*, 283 U. S. 249):

"In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews' 283 U. S. at p. 256."

The interstate railroads suing to have the statutes declared unconstitutional had charged also that the statutes were "contrary to the National Transportation Policy expressed in the Interstate Commerce Act" (34 U. S. Law Week 4103).

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<sup>25</sup> 34 U. S. Law Week 4103, 4104.

### 1. As to Appellants' Sherman Act Argument.

Appellants characterize § 9 as a form of anti-trust legislation (Br., p. 21). They persist in quoting one phrase of § 8, the purpose section of Ch. 531 and omit to quote the entire sentence of which it is a part, thus taking the phrase they quote out of context and giving a totally erroneous impression of the sense in which it was used. Appellants, contradicting the Legislature which enacted the statute, the Governor who recommended and approved it, proclaim their opinion of its purpose. They then make their Sherman Act and supremacy clause argument, not on what § 9 is, but what appellants call it.

The purpose of § 9 is declared in § 8 in plain words by the Legislature to be this:

"In order to forestall possible monopolistic and anti-competitive practices *designed to frustrate the elimination of such discrimination and disadvantage*, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination." (Emphasis ours.)

As to the use in Section 8 of the phrase appellants refer to over and again—

The Legislature was repealing the ABC Law provision fixing consumer prices with the goal of eliminating the discrimination against New York State consumers in the price they pay for alcoholic beverages. This consumer price fixing was *distiller* fixed. It did not take clairvoyance to anticipate that the distillers with the control they had over the price of alcoholic beverages all down the line might take measures to keep distiller and wholesale prices high so that the elimination of the price fixing section would not lower the price the retailer would have to charge to the

consumer. It was to "forestall" such business measures "designed to frustrate the elimination of such discrimination and disadvantage" which the Legislature described as "monopolistic and anti-competitive practices" that § 9 was enacted.

Section 9 provides that each brand price to wholesalers and retailers in New York shall be no more than the lowest price for that brand outside New York.<sup>26</sup> That provision it was hoped would have the *consequence* of forestalling or eliminating monopolistic or anti-competitive practices, if any, as between brand owners or wholesalers; the *consequence* of application of the provision would be the independent action of each brand owner based on its prices outside New York. This statute does not act upon monopolistic or anti-competitive practices *between competitors*. The Sherman Act does.

There are in the economists' sense, monopolistic and anti-competitive practices which fall short of being Sherman Act violations. (*Theatre Enterprises, Inc. v. Paramount Film Distribution Corp.*, 346 U. S. 537, 541 [1954].) Under its police power the New York Legislature could act to relieve the people of the State from the high prices *resulting* from such practices without resorting to its Donnelly Act or relying upon the Sherman Act for anti-trust action.

<sup>26</sup> As the Court of Appeals opinion said (16 N. Y. 2d at p. 56):

"In effect the dependence of the New York price on the maximum price of the distiller for his brand elsewhere is to tie the price in this State in to a national price. \* \* \* The effect is on what the distiller charges here and is an effect closely associated with the sale and distribution of liquor within the State.

"That it reflects and depends on events outside the State does not condemn it. It could as well have been tied into the national average price of liquor or the national cost of living index. It is a device to end a demonstrated discrimination against the New York consumer and it is a device within the power of the State to employ in this regulated activity."

Since this is not an anti-trust statute, what the Sherman Act does or does not permit or declare illegal simply has nothing to do with § 9.

Appellants go so far as to argue (Br., p. 28) that they could be charged with violating the Sherman Act in "collecting and disseminating this [price] information". This, as so many of their arguments, is manifestly absurd. Business organizations and trade associations constantly do this. Activities are Sherman Act violations only when they are part of an anti-Sherman Act conspiracy.

In *Maple Flooring Manufacturers Assn. v. United States*, 268 U. S. 563 (1925) at pp. 577, 579 this Court made very clear indeed that it is only when collecting and disseminating prices is part of a conspiracy evidenced by other activities to be in restraint of competition that it is in violation of the Sherman Act. *American Column & Lumber Co. v. United States* cited by appellants (Br. p. 28) is discussed 268 U. S. at p. 580 as illustrative of such a conspiratorial scheme. For a distiller to obtain its own and its related wholesalers' prices in order to comply with a State statute is hardly a conspiracy. Especially in an industry whose prices are in almost every State required to be filed with a State agency.

Finally on this point, we are reminded that there are anti-monopoly provisions<sup>27</sup> common to the liquor laws of nearly all "license" States. They are the provisions interdicting interest of one level of the liquor industry in the business of other levels of the industry. These laws take

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<sup>27</sup> They contradict appellants' assertion (Br. p. 22) that any tendency of the alcoholic beverage industry to price in an anti-competitive fashion "is a concern of the federal government and is not a problem local in character", and are in harmony with this Court's "long recognized power" in the States to enact such measures. *Watson v. Buck*, 313 U. S. 387, 404 (Mr. Justice BLACK, 1941).



the form not only of prohibiting outright ownership or management interest of one in the other, but the extension of credit or loans by one level to the other which would give a measure of control by the one upon the other. New York has such statutory provisions (§ 101, subd. 1, ¶¶ a, b, c; § 105, subds. 16, 17; § 106, subds. 13, 14). Such provisions have always been treated as state regulation of the industry to prevent monopolistic practices, not as anti-trust legislation and never required to be measured against the Sherman Act to determine whether they conflict or are harmonious with it. *United States Department of Commerce Report*, 1941, *State Liquor Legislation*, p. 20; *Pickerrill v. Schott*, 55 So. 2d 716, 718 (Fla.), cert. den. 344 U. S. 815 (1952); *Weisberg v. Taylor*, 100 N. E. 2d 748, 409 Ill. 384 (1951); *Neel v. Texas Liquor Control Board*, 259 S. W. 2d 312, 316 (1953, Tex.).

## **2. As to Appellants' Robinson-Patman Act Argument.**

Appellants' Robinson-Patman argument is, like so much else in their case, premised on their unfounded characterization of the statute. The argument fails because its premise is invalid.

As illustrative: They say (Br. p. 20) "Section 9 assumes that a geographical price differential is an inherently anti-competitive act" and the Robinson-Patman Act does not. Section 9 makes no assumption whatever about the relationships and practices with which the Robinson-Patman Act deals because that is not the problem with which Section 9 sought to deal. The problem was prices to consumers in New York State by each distiller and related wholesaler independently for its products, not in competition with another distiller's products. Distillers generally were found to be as one and as one through their wholesalers in keeping those prices high.

There were no *competitive* practices among distillers or wholesalers which affected New York prices. On the contrary. The unity of effort in this very lawsuit in which every major distiller and liquor distributor, 62 strong, has joined, demonstrates their singleness of policy insofar as pricing practices go.

Section 9 thus was not enacted to deal with competition among any segment of the liquor industry. Section 9 was enacted as one other provision enacted, in addition to repeal of § 101-C (the distiller fixed consumer price provision), for the purpose of achieving reduction of prices by *all* distillers and related wholesalers to New York consumers. The Governor and the Legislature foresaw—and their foresight has been demonstrated to have been prophetic by the same continued pricing practices of the liquor industry in New York State in the 15 months that have passed since § 101-C has been repealed and Section 9 has remained immobilized—that the repeal of Section 101-c alone would accomplish nothing. They foresaw that judging from the Industry's known practices, they would all as one keep consumer prices high *by* keeping distiller and wholesale prices high. It was to meet this that Section 9 was adopted.

To repeat: the premise of appellants' Robinson-Patman argument is just wrong; Section 9 is utterly unrelated to the Robinson-Patman Act, there is no issue of conflict between them, and discussion of the Act and the Supremacy Clause have no place in this action, as the State Courts have held.

To sum up in brief further the total absence of any relation between Section 9 and the Robinson-Patman Act:

1. Section 9 does not direct appellants to give discounts etc. to New York wholesalers and retailers which they give

in other states. It makes the measure of the prices in New York their lowest prices outside New York. How appellants arrive at outside New York State prices is appellants' affair. New York is concerned only that the New York prices be not higher than the out-of-State prices.

2. If appellants' Robinson-Patman Act argument were sound, New York has for 22 years been violating the Act—as have other States—in putting a total ban on price discrimination by brand owners and wholesalers among their customers, without any exception for reasons of meeting competition (Alcoholic Beverage Control Law § 101-b, the section to which § 9 makes additions).

3. Section 9 is concerned with *a distiller's own* brand prices to those who purchase its products in New York State—with complete disregard of competitors' activities and prices. The Robinson-Patman Act is concerned with competition and relationship among competitors.

4. Finally, if § 9 violates the Robinson-Patman Act, so do the Monopoly States.

Appellants by their contracts with the Monopoly States are required to warrant that their prices to them are no higher than their lowest price elsewhere (*supra*, pp. 7, 31, 51). A State may not violate the Federal Constitution or superseding federal statutes by *action* or statute. State "policy may be expressed either formally by legislation or by implied permission" (*United States v. Frankfort Distilleries*, *supra*, 324 U. S. at p. 301), and surely by uniform, consistent conditions in purchasing contracts by the State.

Certainly the distillers may not violate the Sherman or Robinson-Patman Acts by contract. These Acts indeed are directed against collusive *contracts* and discriminatory business *contracts*. As the Court of Appeals said:

"It is a strained argument to make, as plaintiffs do here that compliance with the compulsion of a public statute which seeks to keep down the price of liquor is the equivalent of an unlawful conspiracy to violate the Sherman Act." (16 N. Y. 2d at p. 59)

### **Recapitulation**

We submit that we have demonstrated that appellants have not shown Section 9 to be unconstitutional; have failed completely to sustain the burden that was theirs, seeking as they do to have a legislative enactment struck down as unconstitutional, of showing that under no possible construction can it be upheld. The tenor of their argument is all through quite the opposite. What they urge is that the section be held unconstitutional if there were a possible construction or a possible hypothetical set of circumstances under which it could conceivably be unconstitutional.

All their arguments, whether of difficulty of compliance, or violation of the Federal Constitution, are spun of a great web of conjecture and speculation, of construction, which at times amounts to fantasy, of both Section 9 and the federal acts they invoke.

And when all is done, their entire position crystallizes into a tenacious stand to retain inviolate appellants' merchandising practices for their profit; primarily to retain their high prices in New York State, where 12% of the liquor business in the nation is done, and where for a variety of reasons appellants have been able to keep their prices so high.

We have shown something of the common practices of the industry which contradict appellants' contentions of difficulty of complying with Section 9.

We have shown that burden upon those whom a police power statute affects does not impeach its constitutionality.

We have shown that under the 21st Amendment, Section 9 is an enactment within the authority of the State.

We have shown that Section 9 is not a burden on interstate commerce; and that the Sherman and Robinson-Patman Acts are utterly unrelated to Section 9.

We have shown, we submit, that the challenged sections of the 1964 Liquor Law are in all respects constitutional and valid.

### CONCLUSION

**The decision below should be affirmed and the challenged sections of the 1964 New York State Liquor Law should be held to be in all respects constitutional and valid.**

Dated: February 9, 1966.

Respectfully submitted,

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## APPENDIX A

**Some Similar Statutory Language in the Alcoholic  
Beverage Control Law Prior to § 9  
(Discussed *supra* p. 33)**

*Re:* Word "inducement".

Alcoholic Beverage Control Law  
§ 101-b, subd. 2 (b).

"2. It shall be unlawful for any person privileged to sell liquors or wines to wholesalers or retailers \* \* \* (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement \* \* \*"

*Cf.* § 101-c Minimum consumer resale prices subd. 6 (a)

"6. The authority is hereby authorized to promulgate rules which are necessary.

(a) to carry out the purpose of this section and to prevent its circumvention by the offering or giving of any rebate, allowance, free goods, discount or any other thing or service of value;"

*Re:* Words "brand owner" or "owner of brand"

Alcoholic Beverage Control Law  
§ 101-b, subds. 3 (a)<sup>xx</sup> (c)

"3. (a) No brand of liquor or wine shall be sold within the state to a wholesaler or retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect.  
\* \* \*

(c) The schedule containing the bottle and case price to wholesalers shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, \* \* \*

§ 9 of 1964 Statute (§ 101-b, subd. 3(i))

"In determining the lowest price \* \* \* reductions shall be made to reflect \* \* \* all rebates, free goods, allowances and other inducements of any kind whatsoever \* \* \*"

§ 9 of 1964 Statute (§ 101-b, subd. 3(d))

"(d) There shall be filed \* \* \* an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, \* \* \*"  
Similarly (f) of subdivision 3.

<sup>x</sup> Amended 1964 by adding after word "inducement" the words of any kind whatsoever.

<sup>xx</sup> Continued with amendments in 1964 statute.

## Appendix A

## § 101-c, subd. 3 (a)

"3. (a) Such schedule shall be filed by (1) the manufacturer or wholesaler who owns such brand if licensed by the authority, or (2) a wholesaler selling such brand, who is appointed as exclusive agent, in writing, by the brand owner for the purpose of filing such schedule, if the brand owner is not licensed by the authority, \* \* \*

Re: Factors in "related person" definition, item 1xxx

## § 101, subd. 1 a, b, c

*Manufacturers and wholesalers not to be interested in retail places.*

1. It shall be unlawful for a manufacturer or wholesaler licensed under this chapter to

(a) Be interested directly or indirectly in any premises where any alcoholic beverage is sold at retail; or in any business devoted wholly or partially to the sale of any alcoholic beverage at retail by stock ownership, interlocking directors, mortgage or lien on any personal or real property, or by any other means.

(b) Make, or cause to be made, any loan to any person engaged in the manufacture or sale of any alcoholic beverage at wholesale or retail.

(c) Make any gift or render any service of any kind whatsoever, directly or indirectly, to any person licensed under this chapter which in the judgment of the liquor authority may tend to influence such licensee to purchase the product of such manufacturer or wholesaler.

Re: Factors in "related person" definition (cont.)

## § 105, subs. 16, 17.

"16. No retail licensee to sell liquors and/or wines for off-premises con-

## § 9 of 1964 Statute (§ 101-b, subd. 3[d])

"\* \* \* As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands." Similarly (f) of subdivision 3.

xxx Item 2 of the definition which plaintiffs contend would give them trouble in compliance is discussed in the next topic of this brief. Plaintiffs raise no question as to Item 3 of the definition.



*Appendix A*

sumption shall be interested, directly or indirectly, in any premises where liquors, wines or beer are manufactured or sold at wholesale or any other premises where liquor or wine is sold at retail for off-premises consumption, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means. \* \* \*

"17. No retail licensee for off-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer at wholesale. No retail licensee to sell liquors and/or wines for off-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer at wholesale or to any person engaged in the sale of liquors and/or wines at retail for off-premises consumption."

§ 106, subds. 13, 14.

"13. No retail licensee for on-premises consumption shall be interested, directly or indirectly, in any premises where liquors, wines or beer are manufactured or sold at wholesale, by stock ownership, interlocking directors, mortgage or lien on any personal or real property or by any other means. Any lien, mortgage or other interest or estate now held by said retail licensee on or in the personal or real property of such manufacturer or wholesaler, which mortgage, lien, interest or estate was acquired on or before December thirty-first, nineteen hundred thirty-two, shall not be included within the provisions of this subdivision; provided, however, the burden of establishing the time of the accrual of the interest, comprehended by this subdivision shall be upon the person who claims to be entitled to the protection and exemption afforded hereby.

"14. No retail licensee for on-premises consumption shall make or cause to be made any loan to any person engaged in the manufacture or sale of liquors, wines or beer at *wholesale*."

## APPENDIX B

## Text of Sections 7, 8 and 9 of Chapter 531, Laws of 1964

§ 7. Section one hundred one-b of such law, as added by chapter eight hundred ninety-nine of the laws of nineteen hundred forty-two, subdivision four thereof having been amended by chapter five hundred fifty-one of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§ 101-b. Unlawful discriminations prohibited; filing of schedules; schedule listing fund. 1. It is the declared policy of the state that it is necessary to regulate and control the manufacture, sale, and distribution within the state of alcoholic beverages for the purpose of fostering and promoting temperance in their consumption and respect for and obedience to the law. In order to eliminate the undue stimulation of sales of alcoholic beverages and the practice of manufacturers and wholesalers in granting discounts, rebates, allowances, free goods, and other inducements to selected licensees, which contribute to a disorderly distribution of alcoholic beverages, and which are detrimental to the proper regulation of the liquor industry and contrary to the interests of temperance, it is hereby further declared as the policy of the state that the sale of alcoholic beverages should be subjected to certain restrictions, prohibitions and regulations. The necessity for the enactment of the provisions of this section is, therefore, declared as a matter of legislative determination.

2. It shall be unlawful for any person [privileged to sell] *who sells* liquors or wines to wholesalers or retailers

(a) to discriminate, directly or indirectly, in price, in discounts for time of payment or in discounts on quantity

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\* Italicized matter new; bracketed matter deleted by Chapter 531.

*Appendix B*

of merchandise sold, between one wholesaler and another wholesaler, or between one retailer and another retailer purchasing liquor or wine bearing the same brand or trade name and like age and quality [.]; (b) to grant, directly or indirectly, any discount, rebate, free goods, allowance or other inducement *of any kind whatsoever*, except a discount not in excess of two per centum for quantity of liquor, a discount not in excess of five per centum for quantity of wine and a discount not in excess of one per centum for payment on or before ten days from date of shipment.

3. (a) No brand of liquor or wine shall be sold [within the state] *to or purchased by* a wholesaler, [or retailer] *irrespective of the place of sale or delivery*, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. [(b) The] *Such* schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, *the number of bottles contained in each case*, the bottle and case price to wholesalers, the *net* bottle and case price [to retailers] *paid by the seller*, [the number of bottles contained in each case,] which prices, *in each instance*, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. *Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.* [(c) The] *Such* schedule [containing the bottle and case price to

*Appendix B*

wholesalers] shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

*(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. [(d) The] Such schedule [containing the bottle and case price to retailers] shall be filed by each manufacturer [and wholesaler who sells brands of liquors or wines] selling such brand to retailers and by each wholesaler selling such brand to retailers.*

[(e)] (c) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to

## Appendix B

list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state *exclusively* by such retailer.

4. Each such schedule shall be filed on or before the tenth day of each month on a date to be fixed by the authority, and the prices and discounts therein set forth shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. Within ten days after the filing of such schedule the authority shall make them or a composite thereof available for inspection by licensees. Within three business days after such inspection is provided for, a wholesaler may amend his filed schedule for sales to retailers in order to meet lower competing prices and discounts for liquor or wine of the same brand or trade name, and of like age and quality, filed pursuant to this section by any licensee selling such brand, provided such amended prices are not lower and discounts are not greater than those to be met. Any amended schedule so filed shall become effective on the first day of the calendar month following the filing thereof and shall be in effect for such calendar month. [No brand of liquor or wine shall be sold except at the price then in effect unless written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter.] All schedules filed shall be subject to public inspection, from the time that they are required to be made available for inspection by licensees, and shall not be considered confidential. Each manufacturer and wholesaler shall retain in his licensed premises for inspection by licensees a copy of his filed schedules as then in effect. The liquor

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authority may make such rules as shall be appropriate to carry out the purpose of this section.

5. For the purpose of raising the moneys necessary to defray the expenses incurred in the administration of this section, on or before the tenth day after this act becomes a law, there shall be paid to the liquor authority by each manufacturer and wholesaler licensed under this chapter to sell to retailers liquors and/or wines, a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for each such licensee. A like sum shall be paid by each person hereafter applying for any such license or by the renewal of any such license, and such sum shall accompany the application and the license fee prescribed by this chapter for such license or renewal as the case may be. In the event that any other law requires the payment of a fee by any such licensee or applicant as set forth in this section for schedule listing, then and in such event the total fee imposed by this section and such other law or laws on each such licensee shall not exceed in the aggregate a sum equivalent to ten per centum of the annual license fee prescribed by this chapter for such license.

6. *The authority may revoke, cancel or suspend any license issued pursuant to this chapter, and may recover (as provided in section one hundred twelve of this chapter) the penal sum of the bond filed by a licensee, or both, for any sale or purchase in violation of any of the provisions of this section or for making a false statement in any schedule filed pursuant to this section or for failing or refusing in any manner to comply with any of the provisions of this section.*

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§ 8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the manufacture, sale and distribution of liquor in this state, (b) the consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination.

§ 9. Subdivision three of section one hundred one-b of such law, as amended by section seven of this act, is hereby amended to add eight new paragraphs, to be paragraphs (d), (e), (f), (g), (h), (i), (j) and (k), to read as follows:

*(d) There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle*



## Appendix B

*and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.*

*(e) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.*

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(f) *There shall be filed in connection with and when filed shall be deemed part of any schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, or by a related person, an affirmation duly verified by such brand owner or such wholesaler designated as agent that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner of such wholesaler designated as agent, or any related person, to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (f), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands.*

(g) *There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to re-*

## Appendix B

*tailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month preceding the month in which such schedule is filed.*

*(h) In the event an affirmation with respect to any item of liquor is not filed within the time provided by this section, any schedule for which such affirmation is required shall be deemed invalid with respect to such item of liquor, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule.*

*(i) In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements, of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer, as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d), (e), (f) and (g) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this paragraph, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based up-*

## Appendix B

on the gallon of liquor, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.

(j) Notwithstanding and in lieu of any other penalty provided in any other provisions of this chapter, any person who makes a false statement in any affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than ten thousand dollars or by imprisonment in a county jail or penitentiary for a term of not more than six months or by both such fine and imprisonment. Every affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be deemed to have been made in every county in this state in which the brand of liquor is offered for sale under the terms of said schedule. The attorney general or any district attorney may prosecute any person charged with the commission of a violation of this paragraph. In any such prosecution by the attorney general, he may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties in respect of any such proceeding which the district attorney would otherwise be authorized or required to exercise or perform, and in such prosecution the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney general or his deputy or assistant so attending.

(k) Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the liquor authority may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.

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MAY 13 1966

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. 545

JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*

*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,  
ROBERT E. DOYLE, constituting the State Liquor  
Authority, and LOUIS J. LEFKOWITZ, Attorney Gen-  
eral of the State of New York,

*Appellees.*

ON APPEAL FROM THE COURT OF APPEALS OF THE  
STATE OF NEW YORK

APPELLANTS' PETITION FOR REHEARING

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# Supreme Court of the United States

OCTOBER TERM, 1965

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No. 545

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JOSEPH E. SEAGRAM & SONS, INC., *et al.*,  
*Appellants,*

*v.*

DONALD S. HOSTETTER, Chairman, JOHN C. HART,  
WALTER C. SCHMIDT, BENJAMIN H. BALCOM,  
ROBERT E. DOYLE, constituting the State Liquor  
Authority, and LOUIS J. LEFKOWITZ, Attorney Gen-  
eral of the State of New York,

*Appellees.*

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## APPELLANTS' PETITION FOR REHEARING

Appellants, on the grounds following, respectfully petition for rehearing of so much of this Court's judgment as holds Sec. 9 of Chap. 531, 1964 Session Laws of New York, on its face constitutional.

A new rule appears to have been announced, although not briefed or orally argued before this Court, to wit, where a state economic regulation has been stayed, this Court will confine its consideration of constitutional issues to the face of the state statute—even where the state courts have first expressed their own views of the Constitutional issues in terms of the statute's probable and possible effects. The practical consequence of such a rule is to cast both declaratory judgment and injunctive proceedings into disrepute as means of prudently taking the measure of a new statute while maintaining the *status quo*. In order to test the

propriety of a new state statute against its likely effects, this new rule requires proceeding at one's peril.

Plaintiff-appellants had assumed that a declaratory judgment was the appropriate way to test a statute. Like the language of the Federal Declaratory Judgment Act, 28 U. S. C. § 2201, the New York Declaratory Judgment Act, CPLR § 3001, permits a court to render a judgment as to "the rights and other legal relations of the parties to a justiciable controversy . . ."

Does this procedure extend to questions of constitutionality? According to Borchard, *Declaratory Judgments* (2nd ed. 1941) at 766:

"Possibly no form of written instrument is more susceptible of construction and interpretation by declaratory judgment than statutes. Nor, where constitutionality may be raised, is there more necessity for simplicity of adjudication for the individual and the community who must know at the earliest opportunity whether they are living under constitutional or unconstitutional laws, for delay may bring uncertainty and difficulties of all kinds."

Borchard was not unaware of the objection that constitutional questions would thus be decided in a vacuum. But, as he points out,

"In passing upon statutes, the Supreme Court, like other courts, may construe or interpret the statute or constitution from internal evidence of its meaning (in some factual setting) or may *apply* the statute or constitution to a varied combination of external facts.<sup>15c</sup> This second function, perhaps the more frequently

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<sup>15c</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393, 52 Sup. Ct. 443, 448 (1932), in dissenting opinion of Brandeis, J. See also Frankfurter and Landis, *The Business of the Supreme Court* (1927) 307 *et seq.*

exercised, involves the application to complex facts of such concepts or standards as due process, equal protection, interstate commerce, reasonable, etc., and necessarily presupposes a full presentation of the facts, the adequate appreciation of which is the main element in the case." (*Id.* at 768.)

Mindful of this Court's admonitions, under the abstention doctrine, that it should not be asked to pass on constitutional issues in the absence of authoritative interpretation by the state courts of a state statute's meaning and incidence, plaintiff-appellants commenced this action in the courts of New York rather than in the Federal district court. See *Railroad Comm'n v. Pullman Co.*, 312 U. S. 496 (1941).

Ultimately appellants obtained an authoritative local interpretation\* of the scope of § 9 by a majority of the Court of Appeals—ruling on the occasion for the statute, the supposed vice at which it was aimed, and the permissible scope of its effects.

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\* The action was initiated in Supreme Court, Albany County, on October 28, 1964. The provisions of Chapter 531 and the amendment to Rule 16, were due to become effective on October 31, 1964. Rule 16 as amended, called for affirmations to be filed by December 1, 1964. Appellants' application for a temporary restraining order pending a hearing on a motion for preliminary injunction, was sought and granted on October 29, 1964. Although plaintiffs sought declaratory judgment and injunctive relief, the case has never been tried. In response to plaintiffs' motion for a temporary injunction, defendants moved to dismiss the complaint and cross-moved for declaratory judgment. The Supreme Court, Albany County, considering the matter on the basis of affidavits and exhibits, denied the motion to dismiss the complaint, granted defendants' motion for declaratory judgment, denied plaintiffs' application for preliminary injunction and vacated the interim stay which plaintiffs initially secured. However, the state courts appeared to have been sufficiently satisfied with the Record. See *Joseph E. Seagram v. Hostetter*, 23 App. Div. 2d 933, 259 N. Y. S. 2d 644, 646 (3rd Dept. 1965) (*per curiam*) ("... it ... is presented upon an adequate record ..."). Stays were granted subsequently by Chief Judge Desmond, and by Mr. Justice Harlan.

As for the occasion of the regulation, the majority of the Court of Appeals found that in some out-of-state markets the retail price for a brand of liquor was lower than the wholesale price of that brand in New York. 16 N. Y. 2d at 54.

As for the supposed vice, according to the majority of the Court of Appeals, Sec. 9 was aimed at "discrimination by the liquor industry against the New York consumer which, as the [Moreland Act] commission had found, cost the New York consumer \$150 million a year above that which a free market would have offered." 16 N.Y. 2d at 55.

As for the object, the majority of the Court of Appeals found that Sec. 9 was intended "to keep down the prices of brand liquors to the customer." 16 N.Y. 2d at 55.

As to the likely effects of Section 9, the majority of the Court of Appeals was fully prepared to discuss the probable practical results of operations under the Statute:

The change to

"a possibly sparse profit situation may make it economically difficult for the liquor industry. If it does it is within the competence of the New York Legislature to make it that way." (*Id.* at 56.)

"...

"If the conditions set down by the Legislature are economically impossible for the liquor industry to meet, it will have to accept this impossibility. But we are of the opinion that they are not economically impossible and that the effect of the 1964 statute will be to reduce liquor profits and pass the benefit of some of them on to New York consumers." (*Id.* at 56.)

"...

"Under section 9 the distillers themselves control the base price since they fix the lowest price else-

where. *If its effect on New York is too low a price they have it within their power to raise the lowest price elsewhere.* The industry must absorb any differential cost in doing business as one of the incidents to a highly regulated industry. The incidental effect of this on prices in another state does not invalidate the New York statute." [*Emphasis supplied*] (*Id.* at 57.)

The majority of Court of Appeals, after considering the possible effects, thus upheld the statute under both the New York and Federal Constitutions. Plaintiffs appealed.

Though plaintiff-appellants' arguments have been directed toward the likely effects of the statute as interpreted by the highest court in New York, they are now told by the Supreme Court that the statute may be considered only on its face. This amounts to holding—without citation of prior holding and contrary to such authorities as Borchard—that neither a declaratory judgment nor a proceeding for an injunction is an effective means of testing the constitutionality of a state statute if the decisive issue may be the effect of the statute. In simplest terms, the Court holds the case premature. Contrast Pugh, "The Federal Declaratory Remedy: Justiciability, Jurisdiction and Related Problems," 6 Vand. L.R. 79, 92-6 (1952).

Equally, the effect of the Court's decision is to undercut the rationale of the abstention doctrine. Appellants have not asked this Court to make "preliminary guesses regarding local law."\* They sought a definitive interpretation from the state's highest court so as to present, if need be, the federal constitutional issues "in clean-cut and concrete form, unclouded by any serious problem of construction

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\* *Spector Motor Service Co. v. McLaughlin*, 323 U. S. 101, 105 (1944).

relating either to the terms of the questioned legislation or to its interpretation by the state courts.'''\* They took care to advise the Court of Appeals of their claims under the Constitution of the United States as well as the New York Constitution.\*\*

The majority of the Court of Appeals held that § 9 was valid under both the New York and Federal Constitutions, irrespective of whether, for example, the direct consequence of this regulation is a general increase in the price level across the country or not. Appellants have contended that, as construed by the majority of the Court of Appeals, § 9 is unconstitutional.

Appellants believe that the decision of the Court of Appeals resolves any questions of interpretation which might avoid or postpone the serious federal constitutional questions presented: on the assumptions made by the Court of Appeals as to its effect, is § 9 constitutional? Having obtained precisely the kind of ruling called for by the abstention doctrine, appellants are now treated to the kind of formula which the Court might well apply in the absence of the abstention doctrine.

Previously this Court has often inquired into the effect of a statute upon interstate commerce even where the statute does not discriminate on its face and the case is heard in the context of a proceeding for a declaratory

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\* *Rescue Army v. Municipal Court of Los Angeles*, 331 U. S. 549, 584 (1947).

\*\* Compare *England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411, 420 (1964).



judgment or injunctive relief,\* e.g. *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951) (state proceeding to enjoin city prohibition against sale of milk pasteurized more than five miles from the city); *Parker v. Brown*, 317 U.S. 341 (1943) (federal suit to enjoin officials of state marketing program from enforcing restrictions against a California raisin producer and packer); *Curran v. Wallace*, 306 U.S. 1 (1939) (federal suit instituted by tobacco warehousemen and auctioneers seeking declaratory judgment and injunctive relief against inspection act); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (stockholder's suit brought in federal court to enjoin company from accepting, and to enjoin governmental officials from enforcing, the Coal Code called for by the conservation act); *Baldwin v. G.A.F. Selig*, 294 U.S. 511 (1935) (federal suit to restrain enforcement of state licensing and penalty procedures). And see *Hood & Sons, Inc. v. DuMond*, 336 U.S. 525 (1949) (appeal from denial of application for a license for an additional receiving depot).

The Court makes much of the fact that because the amendment has been stayed, the effects of the statute are too speculative to rise to problems of Constitutional dignity. If attack by way of declaratory judgment and injunction means that consideration of the constitutional issues may go no further than those which the statute raises on its face, implicit in the Court's reasoning is the view that in this posture of the case, the amendments must be assumed to

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\* It will be recalled that the case announcing the scope of the 21st Amendment in broadest terms and upholding state regulations imposing a fee for the privilege of importing beer, was decided in the context of an injunctive proceeding, the regulations having been stayed when the Court heard the case. *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59, 60 (1936).

have the minimal effect.\*\* There is not that much dispute in the record as to the facts. Defendant-appellees and the majority of the Court of Appeals have indicated little concern as to the effects—whatever they are, the statute remains constitutional.

There are only two likely alternatives. Either

- a) wholesale prices in New York will come down, or
- b) wholesale prices throughout the rest of the country will go up.

If prices in New York go down by the margin of the figures relied upon by the Moreland Commission, then it is clear that wholesalers in New York will be selling below cost. This will inevitably squeeze out the less efficient wholesalers first, but permit the stronger ones to struggle on—for a while longer. This could well constitute a case of primary line injury in violation of the Robinson-Patman Act. This Court seems to recognize that the Supremacy Clause would be violated:

“Although it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely too speculative in the present posture of this case to support the conclusion that New York is foreclosed from regulating liquor prices in the manner it has chosen.<sup>15</sup>” [Footnote omitted] (Slip opinion, pp. 9-10)

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\*\* This is the first time that a court has gone so far as to suggest that the threat of irreparable injury is not real or substantial. To the extent that the issues should come up in more concrete contexts other constitutional issues are likely to be added.

Or, alternatively, wholesale prices throughout the rest of the country will go up. This Court seems to recognize that the Commerce Clause would then be burdened:

"... The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that § 9 must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York. It will be time enough to assess the alleged extra-territorial effects of § 9 when a case arises that clearly presents them." (Slip opinion, p. 7)

If the relevant Constitutional test calls for a weighing of effects—as, for example, with Commerce Clause questions, it is a little hard to see how the Supreme Court can reject the balance struck by the Court of Appeals as unrealistic (though appellants would agree that it is unrealistic) and—without striking a different balance—purport to give declaratory judgment *on the face of the statute* alone. The recognized test has little to do with the face of the statute.

Although appellants invoke the Commerce Clause—which requires a balancing of burden v. benefit—the effect of this Court's instant ruling is to hold that the statute may not be attacked until the burden has occurred. Contrast *e.g. Pennsylvania v. West Virginia*, 262 U.S. 553 (1923).

The Court is asked here to construe two rather different kinds of "antitrust" statutes. In construing antitrust statutes in the past the Court has indicated a willingness to speculate as to the short and long range competitive consequences of particular kinds of transactions, *e.g.* pricing

tactics not yet put into effect, *Appalachian Coals, Inc. v. U. S.*, 288 U. S. 344, 358 (1933); a twenty year requirements contract yet to be performed, *Tampa Electric Co. v. Nashville Co.*, 365 U. S. 320, 325 (1961) (declaratory judgment); and mergers which have not yet taken place, *Brown Shoe Co. v. United States*, 370 U. S. 294 (1962).\*

It is true that where the burden of a state regulation falls largely upon those outside a state, this Court is not bound by the findings of the state court; it may determine for itself the facts upon which an asserted federal right depends, *Southern Pacific Co. v. Arizona*, 325 U. S. 761, 771 (1945). Thus had the Court of Appeals found a minimal impact outside of its borders, this Court would be free to draw its own conclusions. In fact, the Court of Appeals explicitly recognized that the statute's impact may fall almost entirely on other states. This Court's opinion argues that the statute is valid so long as the impact on other states does not become too "grave". "Grave" is hardly a talismanic word, nor is this the kind of guide by which one finds 'chairs one can sit on, tables one can write at'—or laws one can live by.

Moreover, although the Court is reluctant to speculate on the likely consequences of this statute on the prevailing level of liquor prices across the country—for the purposes of the Commerce Clause, it displays no timidity in predicting the likely consequences of the statute within the State of New York—for the purposes of construing the Equal Protection Clause. Appellants are at some loss to under-

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\* For the terms of the conditions under which ownership of Kinney passed to Brown but management remained independent, see *U. S. v. Brown Shoe Co., Inc.*, 1956 Trade Cases Par. 68,244 at p. 71,117 (E. D. Mo., E. Div.).

stand why visibility should be clearer down one Constitutional alley than the other.

It would seem that the Court should address as best it can the constitutional tests with the facts at hand. Alternatively, it should remand for additional proof of key legislative facts. See Karst, "Legislative Facts in Constitutional Litigation", 1960 Supreme Court Rev. 75.

While this Court should not be asked to give advisory opinions on hypothetical Constitutional questions, neither should it insist that a question of violating a criminal statute be faced only after someone has been sentenced or driven out of business.

## CONCLUSION

This Petition for Rehearing should be granted, and the case set down for reargument on the regular calendar.

If, however, the Court believes that the Record as presently constituted could not, under any of the legal theories advanced, permit a weighing of the power of New York against the commercial rights of citizens of other states, or of the relative burdens on those engaged in the liquor industry as compared to the benefits which may be enjoyed by New York consumers, then, alternatively, the proceeding should be remanded to the courts of New York to provide appellants an opportunity to present evidence and obtain more definite findings on the points which the Court thinks crucial. See e.g. *Dean Milk Co. v. City of Madison*, 340 U. S. 349, 360 (1951) (Mr. Justice Black dissenting).

Respectfully submitted,

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The foregoing petition for rehearing is presented in good faith and not for delay.

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# SUPREME COURT OF THE UNITED STATES

No. 545.—OCTOBER TERM, 1965.

Joseph E. Seagram & Sons, Inc., et al., Appellants, v. Donald S. Hostetter, etc., et al.	} On Appeal From the Court of Appeals of New York.
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[April 19, 1966.]

MR. JUSTICE STEWART delivered the opinion of the Court.

This appeal draws in question certain provisions of Chapter 531, 1964 Session Laws of New York, which worked substantial changes in the State's Alcoholic Beverage Control Law. The appellants are distillers, wholesalers, or importers of distilled spirits, who commenced this action in a New York court for an injunction and declaratory judgment against the appropriate state officials, upon the ground that § 9 of Chapter 531 violates the Federal Constitution in several respects.<sup>1</sup> The trial court upheld the constitutionality of the law,<sup>2</sup> and its judgment was affirmed by the Appellate Division<sup>3</sup> and by the New York Court of Appeals.<sup>4</sup> The appellants brought the case here,<sup>5</sup> and we now affirm the judgment of the Court of Appeals.

Chapter 531 was enacted as the result of a sweeping redirection of New York's policy regulating the sale of

<sup>1</sup> The appellants also challenged two minor provisions of § 7 of Chapter 531, 1964 Session Laws of New York. See pp. 14-15, *infra*. The relevant provisions of §§ 7, 8 and 9 of Chapter 531 are set out in the Appendix to this opinion.

<sup>2</sup> 45 Misc. 2d 956, 258 N. Y. S. 2d 442.

<sup>3</sup> 23 App. Div. 2d 933, 259 N. Y. S. 2d 644.

<sup>4</sup> 16 N. Y. 2d 47, 209 N. E. 2d 85, 262 N. Y. S. 2d 453.

<sup>5</sup> 382 U. S. 924.

liquor in the State. For more than 20 years the Alcoholic Beverage Control Law (hereinafter ABC Law) had required brand owners of alcoholic beverages or their agents to file with the State Liquor Authority monthly schedules listing the bottle and case price to be charged to wholesalers and retailers within the State. These schedules were publicly displayed, and sales were prohibited except at the listed prices.<sup>6</sup> In 1950 the ABC Law was amended by the addition of a section which required brand owners or their agents to file price schedules listing the minimum retail price at which each brand could be sold to consumers and which prohibited retail sales at prices less than those fixed in the schedules.<sup>7</sup> The enforcement of these mandatory minimum retail prices was entrusted to the State Liquor Authority rather than to private action, but the Authority was given no power to determine the reasonableness of the prices that were fixed.

In 1963, against a background of irregularities within the State Liquor Authority and extensive dissatisfaction with the operation of the ABC Law, the Governor of New York appointed a Commission to study the sale and distribution of alcoholic beverages within the State. The Commission sponsored various study papers and issued a series of reports and recommendations.<sup>8</sup> It found unequivocally that compulsory resale price maintenance had had "no significant effect upon the consumption of

<sup>6</sup> Laws 1942, c. 899, § 1, as amended, Alcoholic Beverage Control Law, §§ 101-b-3 (a)-(d) (1963 ed.).

<sup>7</sup> Laws 1950, c. 689, § 1, Alcoholic Beverage Control Law, § 101-c (1963 ed.).

<sup>8</sup> See New York State Legislative Annual 401-408, 484-489, 498-500 (1964); Breuer, Moreland Act Investigations in New York: 1907-65, pp. 131-169 (1965). The Commission's Study Paper Number 5 ("Resale Price Maintenance in the Liquor Industry") and Report and Recommendations No. 3 ("Mandatory Resale Price Maintenance") are part of the record in this case.

alcoholic beverages, upon temperance, or upon the incidence of social problems related to alcohol." It also found that New York liquor consumers had been the victims of serious discrimination because of the higher prices and reduced competition fostered by the mandatory minimum price maintenance provision of the law.<sup>9</sup> The Commission therefore recommended the repeal of that provision,<sup>10</sup> and the ultimate response of the legislature was the enactment of Chapter 531.

The legislature did not stop, however, with repeal of the mandatory resale price maintenance provision of the law.<sup>11</sup> In § 9 of Chapter 531 it imposed the additional requirement that the monthly price schedules for sales to wholesalers and retailers filed with the State Liquor Authority must be accompanied by an affirmation that "the bottle and case price of liquor . . . is no higher than the lowest price" at which sales were made anywhere in the United States during the preceding month. It is this provision that is the principal object of the appellants' constitutional attack in this litigation.

Section 9 effects the "no higher than the lowest price" requirement by the addition of paragraphs (d)-(k) to § 101-b-3 of the ABC Law. The affirmation required by paragraph (d), which must be filed and verified by brand owners or their agents who sell to wholesalers in New York, must cover all sales to wholesalers anywhere

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<sup>9</sup> Based upon the comparative price data it assembled, including examples of wholesale liquor prices in New York higher than retail prices elsewhere, the Commission concluded that, because of the mandatory resale price maintenance provision, New Yorkers were subsidizing the liquor industry by \$150,000,000 a year.

<sup>10</sup> The Commission made various other recommendations, including relaxation of certain restrictions on package store licenses and elimination of some of the conditions imposed on establishments serving liquor by the drink.

<sup>11</sup> The mandatory resale price maintenance provision, § 101-c, was repealed by § 11 of Chapter 531.

in the United States by the brand owner, his agent, or any "related person." The less extensive affirmation required by paragraph (e), which applies to persons other than brand owners or their agents who file schedules for sales to wholesalers, need only cover sales elsewhere by the person filing the schedule. The affirmation required by paragraph (f), which must be filed by brand owners, their agents, or "related persons" who sell to retailers in New York, must be verified by the brand owner or his agent and must cover all sales to retailers anywhere in the United States by the brand owner, his agent, or any "related person." The less extensive affirmation required by paragraph (g), which applies to wholesalers who are not "related persons," need only cover sales elsewhere by the person filing the schedule.<sup>12</sup>

The term "related person" is defined in paragraphs (d) and (f) to include any person, the "exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from" the brand owner or his agent. In consequence, before a "related person" wholesaler may sell a particular brand of liquor to a New York retailer, he must secure an affirmation from the brand owner or his agent that the price charged by the wholesaler is no higher than the lowest price at which the brand was sold to any retailer in any other part of the country by any wholesaler doing "substantial" business with the brand owner. Thus, a brand owner doing business in New York must keep himself informed of the prices charged by all "related persons" throughout the United States.

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<sup>12</sup> Sellers seeking to take advantage of the milder affirmations required by paragraphs (e) and (g) must file a representation that they are not "related persons." See Alcoholic Beverage Control Law, Appendix, Rule 16 of the State Liquor Authority, § 65.7 (e), 9 NYCRR 65.7 (e). The schedule requirements of § 101-b do not apply to sales of private label brands of liquor. Alcoholic Beverage Control Law, § 101-b-3 (c).

The scheme of § 9 of Chapter 531 is rounded out by the addition to § 101-b-3 of the ABC Law of paragraph (h), which prohibits sales to wholesalers and retailers of brands for which no affirmation has been filed; paragraph (i), which requires the "lowest price" to reflect all discounts and other allowances to wholesalers and retailers, with the exception of state taxes and delivery costs; and paragraphs (j) and (k), which impose criminal penalties for the filing of a false affirmation.

As a result of a series of stays granted throughout this litigation, the provisions of § 9 have not yet been put into effect. Our concern here, therefore, is only with the constitutionality of those provisions on their face. The appellants attack § 9 on many constitutional fronts. They contend that its provisions place an illegal burden upon interstate commerce, conflict with federal antitrust legislation and thus fall under the Supremacy Clause, and violate both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. We find all these contentions without merit.

Consideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment, the second section of which provides that: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." As this Court has consistently held, "That Amendment bestowed upon the states broad regulatory power over the liquor traffic within their territories." *United States v. Frankfort Distilleries*, 324 U. S. 293, 299. Cf. *Nippert v. Richmond*, 327 U. S. 416, 425, n. 15. Just two Terms ago we took occasion to reiterate that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Hostetter v. Idlewild*

*Liquor Corp.*, 377 U. S. 324, 330. See *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *Ziffrin, Inc. v. Reeves*, 308 U. S. 132; *California v. Washington*, 358 U. S. 64. Cf. *Indianapolis Brewing Co. v. Liquor Comm'n*, 305 U. S. 391; *Joseph Finch & Co. v. McKittrick*, 305 U. S. 395. As the *Idlewild* case made clear, however, the second section of the Twenty-first Amendment has not operated totally to repeal the Commerce Clause in the area of the regulation of traffic in liquor. In *Idlewild* the delivery and use of the liquor was in a foreign country, and the Court held that under those circumstances New York could not forbid sales made under the explicit supervision of the United States Customs Bureau, pursuant to laws enacted by Congress under the Commerce Clause for the regulation of commerce with foreign nations. Cf. *Dept. of Alcoholic Beverage Control v. Ammex Warehouse Co.*, 378 U. S. 124; *Collins v. Yosemite Park Co.*, 304 U. S. 518.

Unlike *Idlewild*, the present case concerns liquor destined for use, distribution, or consumption in the State of New York. In that situation, the Twenty-first Amendment demands wide latitude for regulation by the State. We need not now decide whether the mode of liquor regulation chosen by a State in such circumstances could ever constitute so grave an interference with a company's operations elsewhere as to make the regulation invalid under the Commerce Clause.<sup>13</sup> See *Baldwin v. G. A. F. Seelig*, 294 U. S. 511. No such situation is presented in this case. The mere fact that § 9 is geared to

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<sup>13</sup> Cf. *United States v. Frankfort Distilleries*, 324 U. S. 293, 299, where we stated that the Twenty-first Amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries." See also Note, *The Twenty-first Amendment Versus the Interstate Commerce Clause*, 55 Yale L. J. 815 (1946).

appellants' pricing policies in other States is not sufficient to invalidate the statute. As part of its regulatory scheme for the sale of liquor, New York may constitutionally insist that liquor prices to domestic wholesalers and retailers be as low as prices offered elsewhere in the country. The serious discriminatory effects of § 9 alleged by appellants on their business outside New York are largely matters of conjecture. It is by no means clear, for instance, that § 9 must inevitably produce higher prices in other States, as claimed by appellants, rather than the lower prices sought for New York. It will be time enough to assess the alleged extraterritorial effects of § 9 when a case arises that clearly presents them. "The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin*, 310 U. S. 53, 62. Cf. *Hoopeston Canning Co. v. Cullen*, 318 U. S. 313; *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U. S. 177, 189; *Baldwin v. G. A. F. Seelig*, 294 U. S. 511, 528.

Moreover, as the Court of Appeals observed, the regulatory procedure followed by New York is comparable to that practiced by those States, 17 in number, in which liquor is sold by the State itself and not by private enterprise. Each of these monopoly States, we are told, requires distillers to warrant that the price charged the State is no higher than the price charged in other States. In at least one of these States, the distillers are required to exclude from the sales price all rebates and other allowances made to purchasers elsewhere, and the State has taken positive precautions to insure that the contractual commitments are fulfilled.<sup>14</sup> In some respects, the bur-

<sup>14</sup> The executive vice-president of one of the appellants testified that "We and other distillers have freely entered into contracts with these monopoly states in which we warrant that the f. o. b.



den of gathering information for the warranties made to the monopoly States may be more onerous than that required for the affirmations under § 9, since the warranties generally cover prices in other States at the very time of sale to the monopoly State, whereas the affirmations filed under § 9 cover prices charged elsewhere during the preceding month.

We therefore conclude that the provisions of § 9 on their face place no unconstitutional burden on interstate commerce.

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prices at which our brands are offered to those states are no higher than the lowest price at which we sell in other states."

The Deputy Commissioner of the State Liquor Authority testified that "[I]n a number of other States, e. g., in the State of Pennsylvania, some of these same plaintiffs have been warranting for some time past that the price quoted to the Pennsylvania Liquor Control Board is the 'lowest current price quoted to any other customer,' or 'to any purchaser, dealer, agent or agency of any nature or kind anywhere in the United States of America.'" The same witness later added that "[A]s part and parcel of the offerings of their products in, for example, the State of Pennsylvania, they warrant that 'if and when special cash or commodity allowances, post-offs or discounts are offered to purchasers in any other State or the District of Columbia, the same' shall also be offered the Pennsylvania Liquor Control Board."

The Chairman of the Commission testified at a public hearing before a joint legislative committee that "We have, for example, the State of Pennsylvania which is the largest purchaser of liquor in the world. I think they purchase almost \$400,000,000 worth of liquor a year—one customer. They swing a very big bit of leverage, and you cannot be convinced that that Pennsylvania customer does not insist on the lowest price that the distiller offers anywhere in the country. . . . [T]he State of Pennsylvania has a contract which permits them to send accountants into any supplier's office—and they do. They send corps of accountants into suppliers' offices to determine whether or not they're getting the best price. And in fact, if they were not, they would have a violation of contract . . ."

In the monopoly States, of course, no sales to retailers by private wholesalers take place. Thus, brand owners dealing with those States are not placed in the position of vouching for sales to retailers by wholesalers occupying a "related person" status.

The appellants' contention that § 9 violates the command of the Supremacy Clause needs no extended discussion. The argument is based upon a claimed inconsistency between § 9 and the federal antitrust laws, specifically the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1-7 (1964 ed.), and § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. § 13 (1964 ed.).

In this as in other areas of coincident federal and state regulation, the "teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." *Huron Cement Co. v. Detroit*, 362 U. S. 440, 446. We find no such clear conflict in the present case. The bare assembly, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. *Maple Flooring Assn. v. United States*, 268 U. S. 563, 582-586; cf. *American Column Co. v. United States*, 257 U. S. 377. Section 9 imposes no irresistible economic pressure on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country. Nothing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act against such a conspiracy. *United States v. Frankfort Distilleries*, 324 U. S. 293, 299.

Although it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by § 9, the existence of such potential conflicts is entirely too speculative in the present posture of this case to support the conclusion that New York is foreclosed from regulating liquor prices

in the manner it has chosen.<sup>15</sup> Moreover, § 7 of Chapter 531 has amended the ABC Law by granting to the State Liquor Authority ample discretion to modify the schedule requirements.<sup>16</sup> We cannot presume that the Authority will not exercise that discretion to alleviate any friction that might result should the ABC Law chafe against the Robinson-Patman Act or any other federal statute.

There remain for consideration the appellants' Fourteenth Amendment claims. Section 9, they say, violates the Due Process Clause in two respects, first because it imposes an "unreasonable, arbitrary, and capricious" burden upon them, and second because the statutory definition of "related person" is so vague as to be constitutionally intolerable. And § 9 violates the Equal Protection Clause, they say, because it arbitrarily discriminates among various segments of the liquor industry.

The first contention amounts to a claim of a deprivation of due process of law, based on the argument that § 9 is not designed to promote temperance and that it is an unwise, impractical, and oppressive law. But it is not "the province of courts to draw on their own views as to the morality, legitimacy, and usefulness of a particular business in order to decide whether a statute bears too heavily upon that business and by so doing violates due process. Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There

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<sup>15</sup> Cf. *Wisconsin v. Texaco*, 14 Wis. 2d 625, 630-631, 111 N. W. 2d 918, 921; *Safeway Stores v. Oklahoma Retail Grocers Assn.*, 360 U. S. 334, 342, n. 7.

<sup>16</sup> Sections 101-b-3 (a) and (b) of the ABC Law, as amended by § 7 of Chapter 531, provide: ". . . Such brand of liquor . . . shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. . . ."

was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . The doctrine . . . that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . ." *Ferguson v. Skrupa*, 372 U. S. 726, 728-730.

Moreover, nothing in the Twenty-first Amendment or any other part of the Constitution requires that state laws regulating the liquor business be motivated exclusively by a desire to promote temperance.<sup>17</sup> The announced purpose of the legislature was to eliminate "discrimination against and disadvantage of consumers" in the State.<sup>18</sup> Frustrated by years of unhappy experience with a state-enforced mandatory resale price maintenance system that placed exclusive price-fixing power

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<sup>17</sup> See *State Board of Equalization v. Young's Market Co.*, 299 U. S. 59; *Mahoney v. Joseph Triner Corp.*, 304 U. S. 401; *Indianapolis Brewing Co. v. Liquor Comm'n*, 305 U. S. 391; *Joseph Finch & Co. v. McKittrick*, 305 U. S. 395; *Ziffrin, Inc. v. Reeves*, 308 U. S. 132; *California v. Washington*, 358 U. S. 64.

<sup>18</sup> The intent of the legislature in enacting § 9 is expressed in § 8 of Chapter 531:

" . . . In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of . . . discrimination and disadvantage [to consumers], it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination."

The preceding portion of § 8 states the intent of the legislature in enacting § 11 of Chapter 531, which repealed § 101-c, the mandatory resale price maintenance provision. See Appendix, *infra*, pp. 18-19.

in the hands of the distillers, the legislature adopted § 9 as the core of the liquor price reform contemplated by Chapter 531. We cannot say that the legislature acted unconstitutionally when it determined that only by imposing the relatively drastic "no higher than the lowest price" requirement of § 9 could the grip of the liquor distillers on New York liquor prices be loosened.<sup>19</sup> In a variety of cases in areas no more sensitive than that of liquor control, this Court has upheld state maximum price legislation. See *Nebbia v. New York*, 291 U. S. 502; *Townsend v. Yeomans*, 301 U. S. 441; *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U. S. 251; *Gold v. DiCarlo*, 380 U. S. 520.

The statutory definition of "related person," which the appellants attack as unconstitutionally vague, includes any person "the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent . . . ." The claim of vagueness is centered upon the term "principal or substantial." We cannot agree that that language is so vague as to be constitutionally invalid. The Deputy Commissioner of the State Liquor Authority testified in these proceedings that where the determination of "related persons" is unclear, the appellants will have access to the Authority for a ruling to clarify the issue.<sup>20</sup> As the Court said in *Board*

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<sup>19</sup> We also find without merit the appellants' objection that the price computation provision, § 101-b-3 (i), sweeps too broadly. That provision was intended to circumvent the established industry practice of interpreting "price" as "invoice price" rather than the amount actually realized by the seller on the transaction. There is no indication in the record that § 101-b-3 (i) as applied will require the reflection in New York of every idiosyncratic price fluctuation elsewhere in the United States that happens to produce a "lowest price."

<sup>20</sup> Section 101-b-4 of the ABC Law authorizes the State Liquor Authority to promulgate rules to carry out the purpose of § 101-b.

of *Governors v. Agnew*, 329 U. S. 441, 449, ". . . we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality." Cf. *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 142-146; *Bowles v. Wilkinham*, 321 U. S. 503, 512-516.

Further, as the record indicates, the structure of the liquor industry is such that even the largest national distillers deal through a relatively limited number of wholesalers.<sup>21</sup> Frequently, a wholesaler agrees with a distiller not to sell brands of competing distillers in the same price range, and the prices charged by these wholesalers are potentially subject to the influence of the distillers.<sup>22</sup> We cannot say, therefore, that § 9 on its face imposes an unconstitutional burden on distillers or wholesalers in ascertaining the wholesalers who satisfy the "related person" criterion or in obtaining information on prices charged by such wholesalers.

We come, then, to the appellants' argument that § 9 violates the Equal Protection Clause. That argument is based upon the claim that it was arbitrary for the legislature to except consumer sales and private label brands of liquor from the "no higher than the lowest price" requirement of § 9, and to reduce the scope of the price affirmation required with respect to sales made to wholesalers and retailers by those who are not "related persons."

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<sup>21</sup> The vice-president of Joseph E. Seagram & Sons, Inc., one of the largest national distillers, testified that "Of the 330 wholesalers selling Seagram throughout the country, sixteen do 75 per cent or more of their business in the sale of our brands. Sixty-one do approximately 60 to 70 per cent in the sale of these brands; seventy-three do 40 to 60 per cent; seventy-nine, 20 to 40 per cent; sixty-four, 5 to 20 per cent; thirty-seven, 1 to 5 per cent."

<sup>22</sup> See Borregard and Glusker, *The Distilled Spirits Industry: A Marketing Survey* 65-104, 133-163 (Yale Law School 1950); Oxen-

We do not find that these differentiations constitute invidious discrimination. The legislature could reasonably have believed that, once the prices on sales by distillers and "related persons" were reduced, the prices of private label brands and brands sold by non-"related persons" would follow suit. Nor was it necessary for the legislature to impose the "no higher than the lowest price" requirement on sales by retailers to consumers. The legislature might reasonably have concluded that consumer prices would adequately reflect the reductions in prices to wholesalers and retailers accomplished by § 9, even though the state fair trade statute, which permits private resale price maintenance agreements on sales to consumers, appears to have emerged unscathed by the enactment of Chapter 531.<sup>23</sup> "A statute is not invalid under the Constitution because it might have gone farther than it did, or because it may not succeed in bringing about the result that it tends to produce." *Roschen v. Ward*, 279 U. S., 337, 339. "[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical Co.*, 348 U. S. 483, 489.

Although the appellants' primary attack is upon the constitutionality of § 9, they also challenge two minor provisions added by § 7 of Chapter 531 to the schedule requirements of the ABC Law. The first provision, which requires the price schedules to cover sales to whole-

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feldt, "Whisky Prices," *Industrial Pricing and Market Practices* 445, 477, 483-486 (1951).

<sup>23</sup> The New York fair trade statute is the Feld-Crawford Act, Laws 1940, c. 195, § 3, as amended, General Business Law, §§ 369-a-e. See *National Distillers Corp. v. Seyopp Corp.*, 17 N. Y. 2d 12, 214 N. E. 2d 361, 267 N. Y. S. 2d 193; *National Distillers Corp. v. R. H. Macy & Co.*, 23 A. D. 2d 51, 258 N. Y. S. 2d 298; *Fleischmann Distilling Corp. v. R. H. Macy & Co.*, 24 A. D. 2d 977, 265 N. Y. S. 2d 384; *Victor Fischel & Co. v. R. H. Macy & Co.*, N. Y. Sup. Ct., 154 N. Y. L. J. No. 95, p. 17 (Nov. 17, 1965).



salers "irrespective of the place of sale or delivery," is designed to bring wholesalers within the price-publicity requirement of the law, even though they take delivery of the liquor outside New York for distribution within the State. The second provision, which requires the price schedules on sales to both wholesalers and retailers to include "the net bottle and case price paid by the seller," tends to promote publicity of the seller's profit margins.<sup>24</sup> There is no indication in the present record that the State Liquor Authority will require the appellants to file schedules of prices on sales unrelated to the distribution of liquor in New York. As the Court of Appeals observed with regard to these provisions, "The statute is concerned with New York practices and, if the sales in other States have no relevancy to New York enforcement, the statute permits the Liquor Authority for good cause to waive the general prohibition against sales to wholesalers in the absence of such schedules. It would be reasonable to expect that the statute would be administered consistently with its sole purpose to regulate the intra-state sale of liquor." 16 N. Y. 2d 47, 59; 209 N. E. 2d 701, 706; 262 N. Y. S. 2d 75, 82. We accept this construction of the statute by New York's highest court. *NAACP v. Button*, 371 U. S. 415, 432. As so construed, these provisions serve a clear and legitimate interest of New York in the exercise of its constitutional power to regulate the sale of liquor within its borders.

For the reasons that we have stated, we find no constitutional infirmity in any of the 1964 amendments to the New York ABC Law challenged on this appeal. Although it is possible that specific future applications of Chapter 531 may engender concrete problems of constitu-

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<sup>24</sup> Where the manufacturer is also the seller, this provision is inapplicable. See Alcoholic Beverage Control Law, Appendix, Rule 16 of the State Liquor Authority, § 65.6 (b)(3), 9 NYCRR 65.6 (b)(3).

tional dimension, it will be time enough to consider any such problems when they arise. We deal here only with the statute on its face. And we hold that, so considered, the legislation is constitutionally valid. Accordingly, the judgment of the New York Court of Appeals is

*Affirmed.*

## APPENDIX TO OPINION OF THE COURT.

### Chapter 531, 1964 Session Laws of New York.

§ 7. Section one hundred one-b of such law, as added by chapter eight hundred ninety-nine of the laws of nineteen hundred forty-two, subdivision four thereof having been amended by chapter five hundred fifty-one of the laws of nineteen hundred forty-eight, is hereby amended to read as follows:

§ 101-b. *Unlawful discriminations prohibited; filing of schedules; schedule listing fund*

3. (a) No brand of liquor or wine shall be sold to or purchased by a wholesaler, irrespective of the place of sale or delivery, unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to wholesalers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time of payment, if any. Such brand of liquor or wine shall not be sold to wholesalers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by (1) the owner of such brand, or (2) a wholesaler selling such brand and who is designated as

agent for the purpose of filing such schedule if the owner of the brand is not licensed by the authority, or (3) with the approval of the authority, by a wholesaler, in the event that the owner of the brand is unable to file a schedule or designate an agent for such purpose.

(b) No brand of liquor or wine shall be sold to or purchased by a retailer unless a schedule, as provided by this section, is filed with the liquor authority, and is then in effect. Such schedule shall be in writing duly verified, and filed in the number of copies and form as required by the authority, and shall contain, with respect to each item, the exact brand or trade name, capacity of package, nature of contents, age and proof where stated on the label, the number of bottles contained in each case, the bottle and case price to retailers, the net bottle and case price paid by the seller, which prices, in each instance, shall be individual for each item and not in "combination" with any other item, the discounts for quantity, if any, and the discounts for time payment, if any. Such brand of liquor or wine shall not be sold to retailers except at the price and discounts then in effect unless prior written permission of the authority is granted for good cause shown and for reasons not inconsistent with the purpose of this chapter. Such schedule shall be filed by each manufacturer selling such brand to retailers and by each wholesaler selling such brand to retailers.

(c) Provided however, nothing contained in this section shall require any manufacturer or wholesaler to list in any schedule to be filed pursuant to this section any item offered for sale to a retailer under a brand which is owned exclusively by one retailer and sold at retail within the state exclusively by such retailer.

§ 8. In enacting section eleven of this act, it is the firm intention of the legislature (a) that fundamental principles of price competition should prevail in the

manufacture, sale and distribution of liquor in this state, (b) that consumers of alcoholic beverages in this state should not be discriminated against or disadvantaged by paying unjustifiably higher prices for brands of liquor than are paid by consumers in other states, and that price discrimination and favoritism are contrary to the best interests and welfare of the people of this state, and (c) that enactment of section eleven of this act will provide a basis for eliminating such discrimination against and disadvantage of consumers in this state. In order to forestall possible monopolistic and anti-competitive practices designed to frustrate the elimination of such discrimination and disadvantage, it is hereby further declared that the sale of liquor should be subjected to certain further restrictions, prohibitions and regulations, and the necessity for the enactment of the provisions of section nine of this act is, therefore, declared as a matter of legislative determination.

§ 9. Subdivision three of section one hundred one—b of such law, as amended by section seven of this act, is hereby amended to add eight new paragraphs, to be paragraphs (d), (e), (f), (g), (h), (i), (j) and (k), to read as follows:

(d) There shall be filed in connection with and when filed shall be deemed part of the schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner or such wholesaler designated as agent, or any related person, to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or

to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (d), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) which has an exclusive franchise or contract to sell such brand or brands.

(e) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (a) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed.

(f) There shall be filed in connection with and when filed shall be deemed part of any schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision by the owner of such brand of liquor, or by the wholesaler designated as agent for the purpose of filing such schedule if the owner of the brand of liquor is not licensed by the authority, or by a related person, an affirmation duly verified by such brand owner or such wholesaler designated as agent that the bottle and case

price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such brand owner of [sic] such wholesaler designated as agent, or any related person, to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month immediately preceding the month in which such schedule is filed. As used in this paragraph (f), the term "related person" shall mean any person (1) in the business of which such brand owner or wholesaler designated as agent has an interest, direct or indirect, by stock or other security ownership, as lender or lienor, or by interlocking directors or officers, or (2) the exclusive, principal or substantial business of which is the sale of a brand or brands of liquor purchased from such brand owner or wholesaler designated as agent, or (3) who has an exclusive franchise or contract to sell such brand or brands.

(g) There shall be filed in connection with and when filed shall be deemed part of any other schedule filed for a brand of liquor pursuant to paragraph (b) of this subdivision an affirmation duly verified by the person filing such schedule that the bottle and case price of liquor to retailers set forth in such schedule is no higher than the lowest price at which such item of liquor was sold by such person to any retailer anywhere in any other state of the United States or in the District of Columbia, other than to any state (or state agency) which owns and operates retail liquor stores, at any time during the calendar month preceding the month in which such schedule is filed.

(h) In the event an affirmation with respect to any item of liquor is not filed within the time provided by this section, any schedule for which such affirmation is required shall be deemed invalid with respect to such item



of liquor, and no such item may be sold to or purchased by any wholesaler or retailer during the period covered by any such schedule.

(i) In determining the lowest price for which any item of liquor was sold in any other state or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores, appropriate reductions shall be made to reflect all discounts in excess of those to be in effect under such schedule, and all rebates, free goods, allowances and other inducements of any kind whatsoever offered or given to any such wholesaler, state (or state agency) or retailer, as the case may be, purchasing such item in such other state or in the District of Columbia; provided that nothing contained in paragraphs (d), (e), (f) and (g) of this subdivision shall prevent differentials in price which make only due allowance for differences in state taxes and fees, and in the actual cost of delivery. As used in this paragraph, the term "state taxes or fees" shall mean the excise taxes imposed or the fees required by any state or the District of Columbia upon or based upon the gallon of liquor, and the term "gallon" shall mean one hundred twenty-eight fluid ounces.

(j) Notwithstanding and in lieu of any other penalty provided in any other provisions of this chapter, any person who makes a false statement in any affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be guilty of a misdemeanor, and upon conviction thereof shall be punishable by a fine of not more than ten thousand dollars or by imprisonment in a county jail or penitentiary for a term of not more than six months or by both such fine and imprisonment. Every affirmation made and filed pursuant to paragraph (d), (e), (f) or (g) of this subdivision shall be deemed to have been made in every county in this state in which the brand of liquor is offered for sale under the terms of

said schedule. The attorney general or any district attorney may prosecute any person charged with the commission of a violation of this paragraph. In any such prosecution by the attorney general, he may appear in person or by his deputy or assistant before any court or any grand jury and exercise all the powers and perform all the duties in respect of any such proceeding which the district attorney would otherwise be authorized or required to exercise or perform, and in such prosecution the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney general or his deputy or assistant so attending.

(k) Upon final judgment of conviction of any person after appeal, or in the event no appeal is taken, upon the expiration of the time during which an appeal could have been taken, the liquor authority may refuse to accept for any period of months not exceeding three calendar months any affirmation required to be filed by such person.